TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 446

UNITED STATES OF AMERICA, PETITIONER,

vs.

DANIEL M. LEFKOWITZ AND PAULINE PAPE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 16, 1951

CERTIORARI GRANTED NOVEMBER 26, 1951

(36250)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 466

UNITED STATES OF AMERICA, PETITIONER

vs.

DANIEL M. LEFKOWITZ AND PAULINE PARIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Southern New York	1	1
Docket entries	1	1
Order to show cause	3	2
Affidavit of Pauline Paris in support of motion	5	2
Affidavit of Daniel M. Lefkowitz in support of motion	9	4
Affidavit of Ulysses S. Grant in opposition to motion	17	9
Exhibit—Indictment	23	12
Exhibit—Stipulation re evidence	29	15
Affidavit of Harry Morgenstern in opposition to motion	31	16
Affidavit of J. Ray Olivera in opposition to motion	35	18
Affidavit of Thomas Guilfoyle in opposition to motion	42	22
Affidavit of Joseph M. Hugo in opposition to motion	50	26
Affidavit of Laurence Delmore in opposition to motion	61	31
Complaint before Commissioner Cotter	71	37
Exhibit A—Letter of Henry Miller	79	41
Exhibit B—Letter of Henry Miller	80	41
Exhibit C—Letter of Henry Miller	81	42
Warrant of arrest	82	42
Opinion of Caffey, U. S. D. J.	84	43
Order amending title of proceeding	90	46
Order appealed from	92	47
Order modifying stay	95	48
Petition for appeal	99	50
Order allowing appeal	102	52
Assignments of error	104	52
Citation [omitted in printing]	109	54
Stipulation and order as to exhibits	110	55
Stipulation as to record	112	55
Clerk's certificate [omitted in printing]	113	55

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	114	56
Opinion, Chase, J.	114	56
Dissenting opinion, Swan, J.	117	60
Judgment	119	61
Clerk's certificate [omitted in printing]	121	61
Order allowing certiorari	122	62

In United States District Court, Southern District of New York

IN THE MATTER OF THE APPLICATION OF DANIEL M. LEFKOWITZ AND Pauline Paris for the suppression of any and all evidence of whatever nature, obtained directly or indirectly by reason of a search of premises Room #604 in #1547 Broadway, in the Borough of Manhattan, city and State of New York, and for the return of all books, papers, correspondence and all other papers and records belonging to the said Daniel M. Lefkowitz, etc.

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, respondent

M. 13-367

Docket Entries

1931

Jan. 22. Filed note of issue. Motion to suppress evidence. Ret.
Feb. 16. Filed affidavits and order to show cause to suppress evidence.
Feb. 16. Filed reply affidavit of Ulysses S. Grant, assistant United States attorney.
Feb. 16. Filed reply affidavit of Thomas Guilfoyle, special prohibition agent.
Feb. 16. Filed reply affidavit of Harry Morgenstern, deputy United States marshal.
Feb. 16. Filed reply affidavit of Laurence Delmore, special prohibition agent.
Feb. 16. Filed reply affidavit of J. Ray Olivera, special prohibition agent.
Feb. 16. Filed reply affidavit of Joseph M. Hugo, special prohibition agent.
Feb. 16. Filed opinion, No. 6342, denying motion. Settling order on two days' notice. Caffey, J.
Feb. 18. Filed order amending proceeding to include Pauline Paris as one of the petitioners herein. Caffey, J.
Feb. 18. Filed affidavit of service and order denying motion to suppress evidence and dismissing proceeding. Caffey, J.
Feb. 18. Filed affidavit of service and order vacating stay in order to show cause, except as modified in this order. Caffey, J.
Feb. 28. Filed petition for allowance of appeal to Circuit Court of Appeals.
Feb. 28. Filed order allowing appeal.
Feb. 28. Filed assignment of errors.
Feb. 28. Filed citation to Circuit Court of Appeals. Returnable March 25, 1931.

In United States District Court

[Title omitted.]

Order to show cause.

Upon the annexed affidavit of Daniel M. Lefkowitz, duly verified the 21st day of January, 1931, and the affidavit of Pauline Paris, duly verified the 20th day of January, 1931, and upon all the pleadings and proceedings heretofore had herein.

Let the United States attorney show cause at a stated term of this court, to be held in and for the Southern District of New York, at the Old Post Office Building, in room 331 thereof, in the Borough of Manhattan, city of New York, on the 26th day of January, 1931, at 10.30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made herein for the suppression of any and all evidence of whatever nature obtained directly or indirectly by reason of a search of premises Room #604, in #1547 Broadway, in the Borough of Manhattan, city of New York, on the 12th day of January, 1931, and for the return of all books, papers, correspondence, and other papers, records, and things belonging to the said Daniel M. Lefkowitz, and why an order should not be made herein for such other and further relief as to this court may seem just and proper.

And in the meantime and pending the hearing and determination of this motion and the entry of an order thereon, the United States attorney, any and all agents of the Department of Justice, any and all agents of the Treasury Department, the United States marshal for the southern district of New York and/or his deputies are hereby stayed from using the evidence sought to be suppressed herein for any purpose whatsoever as well as any information directly or indirectly gained therefrom.

Sufficient reason appearing therefor, let service of a copy of this order, together with a copy of the affidavit annexed hereto made upon the United States attorney on or before January 22nd, 1931, be deemed sufficient.

Dated, New York, January 21st, 1931.

HENRY W. GODDARD,
U. S. D. J.

In United States District Court

[Title omitted.]

Affidavit of Pauline Paris, read in support of motion

STATE OF NEW YORK,
City of New York, Southern District of New York, ss:

Pauline Paris, being duly sworn, deposes and says:

That she is a stenographer and typist and is one of the occupants of an office room #604, located at #1547 Broadway, in the Borough of Manhattan, city of New York.

That the said office consists of two rooms, the outer office or reception room and an inner office. The outer room or reception room is separated from the inner office by a partition.

That on the 12th day of January, 1931, about 4 o'clock in the afternoon, deponent returned to room #604 after a short absence. When she did so she saw four or five men unknown to her in the inner office. There was also present a Mr. Williams with whom deponent is acquainted by reason of the fact that said Mr. Williams occupies an office on the same floor in #1547 Broadway, New York City.

When deponent came into the room one of these men came up to her and stated he was a Department of Justice Agent and told her to go into the inner office and sit down; she did so. There were Mr. Lefkowitz, Mr. Williams, and the other men, whom I later learned were Department of Justice agents in that room. This agent thereupon walked to the outer room of the office and looked through all the drawers of the desk. He took deponent's purse therefrom, brought it into the room and examined the contents thereof, but did not take anything.

While deponent was in the office the agents started to search the drawers of the desk and examine the contents thereof. Mr. Lefkowitz asked the agents whether they had search warrants. One of them said that they did, and when Mr. Lefkowit asked to see it the agent stated that when he retained an attorney he would explain everything to him. Mr. Lefkowitz thereupon protested and told them they had no right or authority to search the premises and examine everything they found, which they later carried away. One of the agents retorted that if Mr. Lefkowitz did not keep quiet he would have his face slapped. The men took everything they could find. They searched all the drawers in the desks in the inner and outer rooms and every part of the room. They took and examined books that were in the desk, letters and papers, and even examined the contents of the wastepaper baskets and carried everything away. They also took from one of the desks some personal raffle books of deponent of a charitable organization of which she is a member.

One of the agents, a man whose name deponent has since learned is Olivra, asked her to step into the outer room of the office and told her in the presence of one of the other agents that he did not want to see her stay in jail overnight and ordered her to type a letter addressed to Mr. Ulysses S. Grant, assistant United States attorney, the contents of which to deponent's best recollection was to the effect that "everything having gone all right, I would like to have the undersigned go free on bail." He told deponent to type his name at the end, J. Ray Oliver, and made deponent sign her name under his.

Deponent has every reason to believe that this was a subterfuge in order to have her type the letter and sign her name so that it could be used in this proceeding against her, which deponent is informed and verily believes is unconstitutional and constitutes a violation of

the fourth and fifth amendments and in violation of due process of law.

Deponent knew these men were United States Government agents and that she had to do what she was told. She did not do this voluntarily and only upon the direction and command of this agent, and, therefore, demands its return, its suppression as evidence in any manner whatsoever in this cause, and that any copies thereof should be ordered destroyed and its contents not used, and any information derived therefrom be not used for any purpose whatsoever.

That the arrest of your deponent is unauthorized in that there was no proof which would serve to identify your deponent as the "Jane Doe" for one of the persons for whose apprehension the said warrant of arrest was issued. That there are no facts stated serving to connect your deponent with the crime purported to be set forth in the complaint.

For these reasons deponent's arrest was illegal and wholly unauthorized by any warrant duly issued by any United States commissioner.

Wherefore, your deponent joins in the application of Daniel M. Lefkowitz herein and prays that the letter taken from deponent and referred to herein belonging to her, upon the search heretofore described at premises room #604, in #1547 Broadway, in the Borough of Manhattan, city and State of New York, as well as all information of any kind or nature or any copy thereof gained as a result of said search be suppressed as evidence and that the said letter and any and all copies thereof be returned to your deponent forthwith and that any information obtained therefrom be not used for any purpose whatsoever and that your deponent have such other and further relief as to the court may seem just and proper.

PAULINE PARIS.

Sworn to before me this 20th day of January, 1931.

MAX SCHULTZ,
Notary Public, N. Y. County #924.
Comm. expires March 30, 1932.

In United States District Court

[Title omitted.]

Affidavit of Daniel M. Lefkowitz, read in support of motion

CITY, COUNTY, AND SOUTHERN DISTRICT OF NEW YORK, *ss.:*

Daniel M. Lefkowitz, being duly sworn, deposes and says:

I am the applicant in the above-entitled proceeding. That this affidavit is submitted in support of a motion to obtain an order suppressing any and all evidence of whatever nature obtained directly or indirectly by reason of a search of premises #1547 Broadway, room #604, in the Borough of Manhattan, City of New York,

and for the return of all the books, notes, correspondence, and other papers, records, and things belonging to your deponent.

That deponent has an office at the aforementioned premises. That your deponent at all the times mentioned herein was and now is entitled to the possession of the papers, records, and other documents, the suppression and return of which are sought herein.

On Monday afternoon, January 12, 1981, while I was seated in an inner room of room #604, a man who was at the time unknown to me, but whom I now know to be one Olivera, exhibited a badge and informed your deponent that he was a United States Department of Justice agent and that deponent was under arrest. Your deponent then demanded of said agent that he exhibit a warrant of arrest or other order authorizing your deponent's arrest. Mr. Olivera said that when a lawyer was retained on deponent's behalf he would explain to deponent what it was all about. He at no time exhibited to deponent any warrant of arrest, any search warrant, or other order of the court.

That Mr. Olivera then went to the door and four other men entered the office. There was present at the time a Mr. Williams, who has an office on the same floor, and is engaged in the fair and carnival business, but with whom I had no business dealings. The agent seized Mr. Williams and told him that he was under arrest and proceeded to search his person. Mr. Williams protested the right to search his person, but to no avail. There was also present at that time a young lady by the name of Pauline Paris, who was also placed under arrest over her protest.

Your deponent's person was then forcibly searched without his consent and over his protest. Deponent stated to the agents, and particularly to Mr. Olivera, that he had no right to search him. One of the agents retorted that deponent should keep quiet or he would have his face slapped.

The men then proceeded to make a search of the premises, upon which your deponent again demanded by what right or authority they were searching the premises and taking the property; the agents responded by saying the commissioner would tell deponent all about it when he got there. The agents then proceeded to search the desk in deponent's inner office and the desk in the outer office or reception room. They opened every drawer of these desks, examined the contents thereof and extracted numerous papers and other records therefrom and upon the conclusion of their search carried them away.

That the books, papers, letters, records, and other documents taken and carried away as aforesaid were taken from the following places: From the outer office, one black book and one white book containing names and addresses, a stenographic note-book, stationery, letterheads, letters, stamps, order slips, envelopes with names and addresses typed thereon, a used sheet of carbon paper, sheets of paper with a list of names; from the inner office, letterheads of the firm of Lefkowitz & Bernstein, a leather book with names and telephone

numbers, a list of names and addresses, a check, blank order books. In addition, the agents took miscellaneous paper scraps from the waste baskets in both the inner and the outer office. A bill-fold with various personal effects therein was taken from the person of your deponent. In addition to the examination and investigation hereinbefore described, the agents generally examined the papers and other records lying around in your deponent's office and took them into their possession.

No search warrant or other order of the court was issued commanding the aforementioned indiscriminate and rummaging search. That your deponent estimates that the aforementioned search lasted about one-half hour. That upon its conclusion your deponent in custody of the Department of Justice men was taken before Hon. Garrett W. Cotter, the commissioner for the Southern District of New York. The books, correspondence, and other documents hereinbefore described were at the same time carried away by the Department of Justice agents.

That at no time during the course of the aforementioned search and seizure did the agents of the Department of Justice exhibit to your deponent any warrant for his arrest or any warrant for the search of the pemises in which he was arrested, nor did these agents give to your deponent any receipt or other notation indicating the property and documents taken away by them.

That the said examination, investigation, and seizure were made over the protest and without the consent or authorization of your deponent at any time.

That your deponent is informed and verily believes that the aforesaid examination, investigation, search, and seizure were conducted solely for the purpose of securing evidence to connect your deponent with an alleged conspiracy to violate the laws of the United States. That the source of your deponent's information and the grounds of his belief is a complaint filed upon his arraignment before Hon. Garrett W. Cotter, United States commissioner for the Southern District of New York.

Upon deponent's arraignment before Commissioner Cotter your deponent protested against the unlimited and rummaging search of deponent's office and the seizure of the books, papers, records, correspondence, and other documents therein found. That the said commissioner stated to your deponent that the agents had no right to search deponent's office and to take away the books, papers, records, correspondence, and other documents therefrom. That the said commissioner held your deponent for hearing and released your deponent upon the furnishing of bail in the sum of $2,000.00.

That the said unwarranted and unlawful search hereinbefore described was a violation of deponent's rights under the fourth amendment of the United States Constitution. The first clause of the fourth amendment declares:

"The right of the people to be secure in their persons, house, papers, and effects against unreasonable searches and seizures shall not be violated."

In addition, said search was in violation of deponent's rights under the fifth amendment to the United States Constitution, which requires that:

"No person shall be compelled in any criminal case to be a witness against himself nor be deprived of liberty or property without due process of law."

That the examination and seizure of the books, papers, records, correspondence, and other documents constitute nothing less than a "fishing expedition" through your deponent's private papers and records. That it was a lawless invasion of deponent's premises and a general exploratory search made in the hope that some evidence of crime might be found on the premises. That this general search and rummaging of deponent's office was violative of his constitutional privileges under the fourth and fifth amendments to the Constitution of the United States.

That the forceful taking of the aforementioned books, papers, records, correspondence, and other documents without the consent or acquiescence of your deponent was an unconstitutional and wrongful act and violative of the fourth and fifth amendments.

That the aforementioned search and seizure was conducted by agents of the Department of Justice without any search warrant, without any probable cause, and without any order of any nature whatsoever for a search and seizure. Hence, the search was made contrary to that right of your deponent which guarantees him against search and seizures not based upon an oath or affirmation. That the aforementioned search and seizure was conducted by agents of the Department of Justice acting under the direction of Ulysses S. Grant, Esq., assistant United States attorney for the Southern District of New York.

That all of the books, papers, and documents taken from his person and premises in the manner aforesaid are now in the possession of Ulysses S. Grant, assistant United States attorney, upon whom demand has been made for their return, which demand has been refused.

That since your deponent was arrested your deponent has learned that the arrest was made under the color of a warrant of arrest. That your deponent is informed and verily believes that the said warrant of arrest under which it has been alleged by the United States marshal that your deponent was taken into custody was defective and insufficient as a matter of law, on the face thereof in that the complaint upon which it is founded does not state facts constituting a crime under any statute of the United States or under the statutes mentioned in the said warrant and complaint.

That the arrest of your deponent was unauthorized, in that there were no facts stated in the complaint which would serve to identify

your deponent as "Henry Miller," one of the persons for whose apprehension the said warrant was issued and one of the persons concerning whom the said complaint was filed. At this point deponent respectfully calls the court's attention to the fact that the United States marshal for the Southern District of New York in filing his return stated that he had executed the warrant above referred to by arresting the "within named Henry Miller alias Daniel Lefkowitz." That there are no facts stated in the said complaint tending to connect your deponent with the crime said complaint purports to set forth.

That for these reasons deponent's arrest was illegal and wholly unauthorized.

That your deponent has never been convicted, arrested, or accused of any crime either against the State or Federal laws.

That the reason your deponent proceeds by an order to show cause instead of by the usual notice of motion is because the books, papers, records, correspondence, and other documents are in the possession of the assistant United States attorney in charge of this case and your deponent has been informed and verily believes that the said assistant United States attorney intends to use said documents before the United States grand jury. Your deponent desires to secure the suppression of this evidence before the said assistant United States attorney will have used said evidence in any grand jury investigation or other proceeding.

Wherefore, your deponent respectfully prays that an order to show cause issue herein containing a temporary stay of any and all proceedings on the part of the United States attorney for the Southern District of New York, any and all agents of the Department of Justice, and all agents of the Treasury Department and of the United States marshal for the Southern District of New York and/or any of his deputies, and further directing the United States attorney for the Southern District of New York to show cause why any and all books, papers, documents, and other papers and records belonging to him and obtained as aforesaid upon the search heretofore described of premises #1547 Broadway, in room #604, in the Borough of Manhattan, City of New York, as well as all information of any kind or nature gained as a result of said search directly or indirectly be suppressed as evidence and that any photostats, names, addresses, or copies be destroyed and not used and that the books, papers, documents, correspondence and records as aforesaid be returned to your deponent forthwith and why your deponent should not have such other and further relief as to the court may seem just and proper.

DANIEL M. LEFKOWITZ.

Sworn to before me this 21st day of January, 1931.

MILTON B. SEASONWEIN,
Notary Public, N. Y. County # 946.

Comm. expires March 30, 1932.

In United States District Court

[Title omitted.]

Affidavit of Ulysses S. Grant, read in opposition to motion

STATE OF NEW YORK,
County of New York, Southern District of New York, ss.:

Ulysses S. Grant, being duly sworn, deposes and says:

I am an assistant United States attorney for the Southern District of New York and am in immediate charge of the above-entitled matter on behalf of the acting United States attorney, Robert E. Manley.

The order to show cause, signed by Judge Henry W. Goddard on January 21, 1931, was served on the office of the United States attorney on January 22, 1931, and was given to me late in the afternoon of that day. The grand jury in this district handed up to Judge John C. Knox an indictment, a copy of which is annexed hereto. Judge Knox received this indictment about 11.15 o'clock in the morning of January 22, 1931, and the indictment is now on file with the clerk of this court.

I have read the affidavits of Daniel M. Lefkowitz and Pauline Paris submitted in support of the application of Daniel M. Lefkowitz for the order to show cause and note that Daniel M. Lefkowitz states at page 5 of this affidavit "that the examination and seizure of the books, papers, records, correspondence, and other documents constitute nothing less than a 'fishing expedition' through your deponent's private papers and records. That it was a lawless invasion of deponent's premises and a general exploratory search made in the hope that some evidence of crime might be found on the premises." I infer this statement that the petitioner contends that the Government did not have any evidence that the petitioner was guilty of the crime charged in the complaint filed with Commissioner Garrett W. Cotter and referred to in petitioner's moving papers prior to the search referred to in the moving papers. This is not a fact. Special agents of the Department of Justice, Bureau of Prohibition, J. Ray Olivera and Lawrence Delmore, on the morning of January 12, 1931, informed me of various facts and information obtained by them and other agents in the course of official investigations, most of which facts are stated in the affidavits submitted herewith in opposition to the motion. Special Agent Olivera states in the complaint sworn to by him before Commissioner Cotter what I believe to be ample facts, some of which were known to him and some of which he was informed of by reliable sources of information stated in the complaint, to warrant the charge made in the complaint and the issuance of a warrant of arrest. As a matter of fact, none of the papers or other articles seized at the time of the arrest of the petitioner in room 604 in the building 1547 Broadway, New York City, were used before the

grand jury which found the indictment referred to above, with the exception of certain papers and articles taken from the person of the petitioner, Daniel M. Lefkowitz, after, as I am informed, he had been placed under arrest.

I note that it is stated in the affidavit of the petitioner that all the books, papers, and documents taken from petitioner's person and the premises referred to in the moving papers, were in my possession at the time the affidavit was sworn to and a demand had been made upon me for their return and the demand refused. As a matter of fact, only the papers and things, which I am informed were taken from the person of the petitioner, were in my possession at that time, the rest of the papers and articles being in the possesion of Horace J. Simmons, special agent in charge, Department of Justice, Sub-Treasury Building, New York City, and were being used by him and special agents, I am informed, primarily for the purpose of ascertaining the identity of any other persons that may have been associated with the petitioner and the other persons that may have been associated with the petitioner and the other persons named in the complaint in committing the crime charged in the said complaint and indictment. Since receiving the order to show cause, however, I have requested that all the papers seized at the time of the arrest, referred to in the moving papers, be sent to my office, and I do now have the papers, and I admit that I informed petitioner's attorneys that I would not return the papers and other articles, as I believed the search and seizure incident to the arrest of the defendants to be valid and that the Government had the right to use the papers and other articles seized. I have, however, returned to the attorneys for Daniel M. Lefkowitz a certain check which, I am informed, was taken from the person of Daniel M. Lefkowitz at the time of his arrest, and also his automobile license, which, I am informed, was taken from his person at the time of his arrest, upon his attorneys stipulating that photostatic copies of these papers could be used with the same force and effect as the originals. I returned these papers at the request of Daniel M. Lefkowitz and his attorneys for the sole reason that I did not wish to submit the defendant Daniel M. Lefkowitz to any unnecessary inconvenience or hardship by retaining papers which he would need for operating his automobile or to obtain money which he claimed to be entitled to by means of the check, when photostatic copies could be used by the Government with the same force and effect. I also have returned to Daniel M. Lefkowitz the papers referred to in the annexed copy of a receipt and stipulation with the understanding therein stated. I believe it is to the interest of the United States to retain the originals of the rest of the papers seized, and, therefore, on behalf of the United States, oppose the application of the petitioner for the return of these papers and for the suppression of their use as evidence either against the petitioner or other persons whose guilt may be disclosed by the papers.

Upon the filing of the complaint with Commissioner Cotter as aforesaid, he issued a warrant calling for the arrest of the persons described in the complaint. This warrant was delivered to the acting United States marshal, and I arranged with him to have a deputy marshal execute the warrant and also arrange to have several special agents of the Department of Justice to accompany the deputy marshal to assist in making the arrests. During the latter part of the afternoon of January 12, 1931, I received a telephone call from Special Agent Olivera. He informed me that an arrest of several persons had been made, including that of the girl designated as "Jane Doe" in the complaint and warrant, and he asked me if the prisoners could be arraigned before Commissioner Cotter so they could be released on bail. I did arrange for Commissioner Cotter to stay in his office until the prisoners were brought before him for arraignment. The prisoners were arraigned about 5.15 in the afternoon of that day. At the arraignment, I moved that the complaint be amended so as to insert the true name of the defendants and also to add the name of Benjamin Williams, who, I am informed, was arrested in room 604 in the building 1547 Broadway, at the time of the arrest of the other defendants. I understood that the commissioner granted this motion. The defendants were then released on bail fixed by the commissioner and the hearing was set for February 10, 1931. The defendant Benjamin Williams called upon me at my office the next day and informed me that he was not a party to the conspiracy charged in the complaint. I had a grand jury subpœna issued and served upon him and he appeared before the grand jury on January 21, 1931, and as a result of his testimony received the immunity provided for by section 30 of Title II of the national prohibition act. I thereupon took him before Commissioner Cotter on January 21, 1931, and moved for the dismissal of the complaint as to him, and this motion was granted. There is, therefore, no charge now pending against Benjamin Williams. I am informed, however, by the special agents of the Department of Justice who were present at the time of his arrest and by Benjamin Williams, and I believe that Benjamin Williams had in his coat pocket at the time of his arrest, in room 604 in the building 1547 Broadway, a quart bottle of intoxicating liquor.

It is, of course, not convenient to attach copies of all the seized papers to the affidavits submitted in opposition to this petition, but I expect to produce in court at the time of the argument of the motion the papers and articles seized, all of which, I am informed by the agents and deputy marshal, are referred to and described in the affidavits of Olivera, Morganstern, Delmore, and Guilfoyle, and I respectfully request that the original papers be examined by the court and that they be considered as referred to in the affidavits, with the same force and effect as though they were annexed to the affidavits. The papers and articles taken from Benjamin Williams have been returned to him by me and are not enumerated in the said affidavits.

This affidavit is submitted by me in opposition to the application made herein for the suppression as evidence and the return of books, papers, and articles referred to in the moving papers.

ULYSSES S. GRANT.

Sworn to before me this 31st day of January, 1931.

[SEAL.] CATHARINE M. CONLAN,
Notary Public.

Bronx County No. 61, Reg. 3117. Cert. filed in N. Y. Co. No. 155, Reg. No. 1C138. Commission expires March 30, 1931.

Indictment, attached as exhibit to affidavit of Ulysses S. Grant

In the District Court of the United States of America for the Southern District of New York

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors of the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for said district, upon their oath present:

That heretofore, to wit, beginning on the 1st day of September, 1929, and continuing down to and including the 12th day of January, 1931, at the city of New York, in the Southern District of New York and within the jurisdiction of this court, Daniel M. Lefkowitz, Herman Bernstein, and Pauline Paris, the defendants herein, unlawfully, wilfully, and knowingly did combine, conspire, confederate, and agree together and with each other and with divers other persons whose names are to the grand jurors unknown, to commit divers offenses against the United States, to wit, to sell, to possess, to transport, to take orders for, to solicit orders for, and to advertise for sale, keeping for sale, the furnishing of, the price, and where to obtain intoxicating liquor containing more than one-half of one per cent of alcohol by volume and fit and intended for use for beverage purposes, and to use and induce common carriers such as express and freight companies and agents and employees of such common carriers, to carry and ship packages and receptacles containing intoxicating liquor containing more than one-half of one per cent of alcohol by volume and fit and intended for use for beverage purposes, without notifying the said carriers of the true nature and character of said shipments and to maintain a common nuisance in room 604 in the building known as 1547 Broadway, city, county, State, and Southern District of New York, and to do all of the aforesaid without permits and in violation of and contrary to the provisions of and otherwise than as authorized by the act of Congress of October 28, 1919, commonly known as the national prohibition act and acts amendatory thereof and supplemental thereto and regulations issued and promulgated under the provisions of said acts.

It was a part of said conspiracy that the defendant Herman Bernstein should rent a room in the building known as 1547 Broadway, city, county, State and Southern District of New York, that the defendants should occupy said room ostensibly for the purpose of conducting a real-estate business under the trade name of "The Southern Agency—D. M. Lefkowit," but actually for the purpose of maintaining in said room a common nuisance, and to carry out the aforesaid other unlawful objects of the said conspiracy by soliciting by letter sent by the defendants through the United States mails, by telephone, and otherwise, under the name of "Henry Miller" and "William Salmon" from divers persons throughout the United States orders for divers kinds of intoxicating liquors containing more than one-half of one per cent of alcohol by volume and fit for beverage purposes, and to furnish said intoxicating liquor for beverage purposes to the persons ordering said intoxicating liquor as aforesaid, and that the defendants should use said room as their headquarters from which to arrange for the shipment and delivery of said intoxicating liquor to the said divers persons ordering said intoxicating liquor from the defendants by way, among others, of common carriers such as the railway express agency without informing the common carrier of the fact that intoxicating liquor was being shipped and by using false and fictitious names and addresses as shipper of said liquor, and as their headquarters from which to collect payment for the said intoxicating liquor so sold, shipped, and delivered by the defendants.

OVERT ACTS

1. In pursuance of said conspiracy and to effect the objects thereof, on or about October 30, 1929, at the city, county, State, and Southern District of New York and within the jurisdiction of this court, the defendant Herman Bernstein had a conversation with Sadie Lindsay, the assistant manager of the building known as 1547 Broadway, New York City, with reference to and arranged with said Sadie Lindsay for the renting from month to month by Herman Bernstein of room 604 in said building 1547 Broadway.

2. In pursuance of said conspiracy and to effect the objects thereof, on January 31, 1931, at the city, county, State, and Southern District of New York and within the jurisdiction of this court, in room 604 of the building known as 1547 Broadway, New York City, the defendant Pauline Paris had a conversation with special agents of the Department of Justice then using the names of Jose Hernandez and Manuel Negroni with reference to a past shipment of intoxicating liquor by defendants to Buffalo, New York, and with reference, among other things, to prices of liquor that could be furnished by defendants and possible future deliveries of liquor by defendants to said Manuel Negroni.

3. In pursuance of said conspiracy and to effect the objects thereof, on January 5, 1931, at the city, county, State, and Southern District

of New York, and within the jurisdiction of this court, in room 604 of the building known as 1547 Broadway, New York City, the defendant Daniel M. Lefkowitz had a conversation with a special agent of the Department of Justice then using the name of Manuel Negroni with reference to a past shipment of liquor by defendants to Buffalo, New York, and a possible future shipment of liquor to said Manuel Negroni.

4. In pursuance of said conspiracy and to effect the objects thereof, on January 7, 1931, at the city, State, and Southern District of New York and within the jurisdiction of this court, the defendants transported and caused to be transported one case of Scotch whiskey containing more than one-half of one per cent of alcohol by volume and fit and intended for use for beverage purposes.

5. In pursuance of said conspiracy and to effect the objects thereof, on or about October 28, 1930, in the Southern District of New York, the defendants delivered and caused to be delivered to the Railway Express Agency two packages containing intoxicating liquor containing more than one-half of one per cent of alcohol by volume and fit and intended for use for beverage purposes, for shipment by said Railway Express Agency to Anthony Craig at Buffalo, New York, without informing said Railway Express Agency that said packages contained intoxicating liquor and gave to said Railway Express Agency the fictitious shipper's name of Lee Brothers.

6. In pursuance of said conspiracy and to effect the objects thereof, on or about October 31, 1929, in the Southern District of New York, the defendant Daniel M. Lefkowitz signed a request and contract for the installation by the New York Telephone Company in room 604 in said building 1547 Broadway, New York City, of an individual semicoin box telephone and for telephone service in said room.

7. In pursuance of said conspiracy and to effect the objects thereof, on or about October 30, 1929, at the city, county, State, and Southern District of New York and within the jurisdiction of this court, the defendant Herman Bernstein signed a request and contract for electric-light service to be furnished to him in room 604 in the said building 1547 Broadway, New York City, by the New York Edison Company.

8. In pursuance of said conspiracy and to effect the objects thereof, on January 6, 1931, in the Southern District of New York, the defendant Pauline Paris had a telephone conversation with a special agent of the Department of Justice using the said name of Manuel Negroni with reference to a shipment and delivery of liquor by defendants to said Manuel Negroni.

Against the peace and dignity of the United States and contrary to the form of the statutes of the United States in such case made and provided. (Section 37 U. S. C. C. and act of October 28, 1919, and acts amendatory thereof and supplemental thereto and regulations issued thereunder.)

SECOND COUNT

And the grand jurors aforesaid, on their oaths aforesaid do further present:

That between October 30, 1929, and January 12, 1931, both dates inclusive, in the Southern District of New York and within the jurisdiction of this court, Daniel M. Lefkowitz, Herman Bernstein, and Pauline Paris, the defendants herein, unlawfully, wilfully, and knowingly did maintain a common nuisance at, and within room 604 in the building known as 1547 Broadway, city, county, State, and Southern District of New York, where intoxicating liquor, to wit, rye whiskey, Scotch whiskey, gin, creme de menthe, creme de cocoa, vermouth, and divers other kinds of intoxicating liquor, containing more than one-half of one per cent of alcohol by volume and fit and intended for use for beverage purposes, was sold and bartered in violation of title 2 of the national prohibition act; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Title II, act of October 28, 1919.)

ROBERT E. MANLEY,
Acting United States Attorney.

United States District Court, Southern District of New York

UNITED STATES OF AMERICA

vs.

DANIEL M. LEFKOWITZ, PAULINE PARIS, ET AL., DEFENDANTS

Stipulation annexed to affidavit of Ulysses S. Grant

Without prejudice to the rights of either the United States or the defendants, the following papers are hereby returned to defendant Daniel M. Lefkowitz and receipt is hereby acknowledged of these papers and it is stipulated and agreed that secondary evidence of the contents of these papers may be used by the United States with the same force and effect as the original papers and that the original papers will be returned to the United States attorney if requested:

3 small snapshot pictures of Daniel Lefkowitz's children.
1 membership card of Mecca Temple No. 19666.
1 membership card of the Consistory of New York City, 32°.
1 membership card of Ceba Lodge No. 954 (Free & Accepted Masons).
1 membership card of Tall Cedars of Lebanon #1691.
1 yellow slip of paper bearing name of James F. Hart, 36 West 44th Street, N. Y. C.
Municipal Court, Manhattan, 6th district.
Order of #7681/30 7665 $183.40.

Suspension—Certificate of registration, State of New York, Bureau of Motor Vehicles, dated Dec. 26, 1930, registration No. 3N 8314 & all 1930 & 1931 reg. Order No. 168803 issued to Daniel M. Lefkowitz, 207 W. 106th Street, New York City.

1 pawn ticket on the Provident Loan Society, 736 Seventh Avenue, New York City, amount, $150, for a diamond ring, ticket #86-072, dated Nov. 10, 1930.

DAVID P. SIEGEL,
Attorney for defendants.
ROBERT E. MANLEY,
Acting U. S. Attorney.
Per U. S. GRANT,
Asst. U. S. Atty.

In United States District Court

[Title omitted.]

Affidavit of Harry Morgenstern, read in opposition to motion

STATE OF NEW YORK,
County of New York, ss:

Harry Morgenstern, being duly sworn, deposes and says:

I am a deputy United States marshal for the Southern District of New York.

On January 12, 1931, in the afternoon of that day the acting United States marshal, Raymond J. Mulligan, handed to me in the marshal's office a warrant of arrest and a certified copy of a complaint, copies of which are annexed to the affidavit of Laurence Delmore, sworn to January 28, 1931, except that the complaint had not been amended at that time to include the name of Benjamin Williams and the true name of Henry Miller and Jane Doe were not inserted in the complaint or warrant at that time, and the return, of course, was not on the warrant at the time it was given to me.

Mr. Mulligan instructed me to execute the warrant, and informed me that Special Agent Olivera, who was introduced to me at that time by Mr. Mulligan, and three other special agents of the Department of Justice were to accompany me and assist me in making the arrest and would be able to identify the persons designated in the said complaint and warrant of arrest.

About 3.35 p. m. on January 12, 1931, I, in company with Special Agents Olivera, Delmore, Guilfoyle, and Gaughan left the Federal Building and proceeded to 1547 Broadway, New York. I, in company with two of the special agents, got off the elevator in said building at the fifth floor and proceeded up the stairway to the sixth floor and waited on the landing until we were informed by Agent Delmore that the persons, or some of them, named in the said warrant were present in room 604 in said building. We remained on the

landing not more than a few minutes when Delmore informed us that persons were in the room, and I and Special Agents Delmore, Guilfoyle, and Gaughan thereupon entered room 604 in said building for the purpose of effecting the arrest of the persons named in said warrant.

I should judge that this room is about 10 feet wide by 20 feet long and is divided into what might be called an inner and an outer office by a partition in about the middle of the room. As we entered the room I observed a man near the entrance to the inner office and I observed Special Agent Olivera point to this man and state "That is Henry Miller." I had the warrant of arrest in my hand at the time. I asked this man if he was Henry Miller and he told me that his name was Dan Lefkowitz. He having been identified by Olivera as the Henry Miller named in the complaint and warrant, I placed the man under arrest after he had asked me if I had a warrant, and I had informed him that I was a deputy United States marshal and did have a warrant of arrest. In my presence, Special Agent Delmore thereupon searched the person of Henry Miller (Dan Lefkowitz) and gave me the papers and articles which are enumerated in Delmore's said affidavit. These papers were given by me the following day to Assistant United States Attorney U. S. Grant, they having been in a sealed envelope in the safe in the marshal's office over night.

About between 5 and 10 minutes from the time we entered the said room, a young lady entered the room and I was informed by Special Agent Olivera that she was the Jane Doe named in the complaint and warrant of arrest. I thereupon placed her under arrest. She informed me that her name was Pauline Paris. The special agents who accompanied me made a search in said room 604 and I am informed and believe that they took with them various papers and articles which they retained in their possession.

There were two other men in the room. One man, who gave his name as Benjamin Williams, was placed under arrest by one of the special agents. I am informed and believe that he had a bottle of liquor in his pocket at the time. Another man was questioned, but was not placed under arrest or detained.

While we were in this room, Special Agent Olivera called Assistant United States Attorney Grant on the telephone and I was informed by him that he had arranged to have Commissioner Cotter remain in his office until the prisoners could be arraigned. I with my two prisoners and the special agents and said Benjamin Williams, who had been arrested by one of the special agents, later all left said room 604 and proceeded to the office of Commissioner Cotter, where the prisoners were arraigned and released on bail.

I have read the affidavit of Daniel Lefkowitz, sworn to January 21, 1931, and note that he states in his affidavit that at the time his person was searched, one of the agents told him to keep quiet or that he would slap his (Lefkowitz's) face. This is not true, no such statement was made at that time to Lefkowitz. I also

note that Daniel Lefkowitz states that at no time while we were in room 604 did the agents of the Department of Justice exhibit to Lefkowitz any warrant for his arrest or any warrant for the search of the premises. As aforesaid, prior to placing Lefkowitz under arrest, he asked me if I had a warrant and I told him that I was a deputy United States marshal and had a warrant of arrest and that I would let him read it as soon as we got through with the work in the room. Lefkowitz thereupon said to me "all right." At no time did I or any of the agents to my knowledge make any claim that we had a search warrant.

HARRY MORGENSTERN.

Sworn to before me this 28th day of January, 1931.

[SEAL.] CATHARINE M. CONLAN.
Notary Public.

Bronx County No. 61, Reg. 3117. Cert. filed in N. Y. Co. No. 155, Reg. No. 1C138. Commission expires March 30, 1931.

In United States District Court

[Title omitted.]

Affidavit of J. Ray Olivera, read in opposition to motion

STATE OF NEW YORK,
County of New York, ss.:

J. Ray Olivera, being duly sworn, deposes and says:

I am a special agent of the Department of Justice, Bureau of Prohibition.

On January 12, 1931, I swore to a complaint before Commissioner Garrett W. Cotter, a photostatic copy of which complaint is annexed to the affidavit of Laurence Delmore, sworn to January 28, 1931. I here reaffirm the allegations contained in said complaint.

I have read the affidavit of Joseph M. Hugo, sworn to January 24, 1931, and all the information therein contained was known to me prior to January 12, 1931, with the exception of the fact of the receipt of the William Salmon letter by Hugo on January 12, 1931. Some of the information contained in said Hugo's affidavit as indicated in the affidavit was known to me of my own personal knowledge and the rest of the information was given to me by Special Agent Hugo. Some of the facts stated in Hugo's affidavit are stated in the said complaint sworn to by me before Commissioner Cotter on January 12, 1931.

On January 12, 1931, I went with Deputy United States Marshal Morgenstern and Special Agents Delmore, Guilfoyle, and Gaughan to assist the said deputy marshal in effecting the arrest of the persons named in said complaint and warrant of arrest which had been issued by Commissioner Cotter and given to said deputy United States marshal by the acting United States marshal in the after-

noon of January 12th. We left the Federal Building, New York City, about 3.35 p. m. and arrived at the building No. 1547 Broadway about 4.00 p. m. We all entered the elevator in said building and I and Special Agent Delmore proceeded to the 6th floor, while the deputy marshal and the other two special agents got off at the fifth floor.

On January 9, 1931, I called a number, Chickering 4-8928, which is the number of the telephone in room 604 in the building 1547 Broadway. A girl answered the telephone whose voice I recognized as that of the girl I had talked to previously in said room and who I now know to be Pauline Paris and who is the girl designated by me in said complaint as "Jane Doe." At this time she informed me that she could receive orders for whiskey and asked me if the stuff that I had received was all right. I asked for an appointment with Miller and she said he was not in but that I could talk to his partner. A man then came to the telephone and he also asked me if the stuff I received was good and I arranged with him to come to said room 604 on Monday, January 12, 1931, at 3.00 p. m. to see Miller and arrange for further orders and deliveries. Since I had this appointment, I entered room 604 on January 12th first in order to ascertain whether or not the persons or any of them named in the complaint and warrant of arrest were present in the room at that time. I had arranged with Special Agent Delmore to inform him of the presence of any of said persons in the room by taking off my hat upon entering the room if they were there. I entered said room at about 4.00 p. m. on January 12th and upon observing the man who I at that time knew as Henry Miller standing near the entrance to the inner office of said room, I took my hat off. As I entered the room, another man who I now know as Benjamin Williams preceded me into said room 604. This man Williams said to Henry Miller who I now know to be Dan Lefkowitz "I've got it" and pointed to his coat pocket where I observed a package. Henry Miller (Daniel Lefkowitz) said "I see you got it, I can smell it" in a joking tone of voice. When Henry Miller saw me he said "Come on in." I said "If you are busy, I will wait," and I stayed by the entrance to room 604. It was not more than a few minutes, and in fact, not more than two minutes, that the rest of the men who accompanied me to the building entered the room. As the men entered, Miller was leading me by the arm in a friendly manner into the inner office. As the men came in, Miller looked at me in a surprised manner, and I said to him, "That's all right Miller, we are Federal agents," and I pointed to Henry Miller and told the marshal that "He is the man known to me as Henry Miller." The deputy marshal thereupon placed him under arrest.

Between 5 and 10 minutes after we first entered the room a young lady entered the room who is the young lady with whom I have had the conversation referred to in the said complaint sworn to by me that day before Commissioner Cotter. I informed the deputy marshal that she was the "Jane Doe" referred to by me in the complaint and he thereupon placed her under arrest.

Room 604 is about 10 feet wide by 20 feet long and is divided by a partition into what might be called as an inner and outer office. Prior to the girl entering room 604, I had remained in the outer office and was searching the desk which was used by her on the other occasions when I had been in the said room.

The center drawer in the stenographer's desk was open part way and I saw a book and a pocketbook in the drawer. The book is the cardboard loose-leaf binder referred to in the affidavit of Special Agent Guilfoyle as the 8th item taken from said desk. When the young lady who I now know to be Pauline Paris entered the room, I handed her her pocketbook. After she was placed under arrest and was sitting in the inner room, I asked her to open the pocketbook which I had previously handed to her to let me see what it contained. Nothing was taken from the pocketbook. I and Special Agent Guilfoyle also searched what might be designated as a towel cabinet in the outer office. I also took some things from the desk in the inner office. All of these papers and the places from which they were taken are enumerated in the affidavit of Special Agents Guilfoyle and Delmore submitted herewith. A number of scraps of paper were taken from waste paper baskets both in the inner and outer office and were later pasted together as stated in the affidavit of Delmore.

The said deputy United States marshal informed said Lefkowitz that he had a warrant for his arrest prior to the time that said Lefkowitz was placed under arrest by the deputy United States marshal and prior to the time he was searched by Special Agent Delmore. At no time did the deputy United States marshal or any of the special agents inform Lefkowitz that we had a search warrant. No claim was made that we had any search warrant. The search was made incident to the arrest and not by virtue of any search warrant. At the time that I entered the room, I knew by reason of the aforesaid that said Henry Miller (Dan Lefkowitz) and the young lady, Pauline Paris, and others, were guilty of the crime of maintaining a nuisance in said room by selling and bartering liquor in said room, and that they were guilty of the crime of conspiracy to violate the national prohibition act; and the room was searched to discover the instruments of the crime and to seize evidence of the crime then being committed by the persons arrested.

Williams was arrested by one of the special agents; I think it was Special Agent Gaughan.

I have read the affidavit of Daniel M. Lefkowitz sworn to January 21, 1931. As above stated, I informed Lefkowitz that I was a Department of Justice agent and showed him my badge, but I didn't say that he was under arrest. He was told he was under arrest by the deputy marshal after I had identified him to the deputy marshal. I didn't tell Lefkowitz that I would explain to him what it was all about after a lawyer had been retained by Lefkowitz. The deputy marshal told him that he had a warrant of arrest and he had the warrant in his hand at the time. I didn't place

Mr. Williams under arrest and did not search his person. Williams was searched by one of the other special agents. Pauline Paris entered the room after Special Agent Delmore had started to search Daniel Lefkowitz, and I believe that Special Agent Delmore had completed the search of the person of Daniel Lefkowitz before Miss Paris entered the room, but I am not sure of this. No force was used in the search of the person of Daniel Lefkowitz as he did not resist after he was informed by the deputy marshal that the deputy marshal had a warrant for his arrest. At the time that Lefkowitz was searched, no remark was made by any of the special agents that he would slap Lefkowitz's face. Lefkowitz did not state to me that I had no right to search him and I did not search him. As a matter of fact, I was not in the inner office when he was being searched but I could see that he was being searched by looking through the entrance to the inner office. No stamps were taken from room 604 by me or any of the other special agents or the deputy marshal.

I have also read the affidavit of Pauline Paris, sworn to January 20, 1931. Upon my request, she did type the note referred to in the affidavit of Special Agent Guilfoyle. I did this partly with the bona fide intention of facilitating her early release on bail and also, of course, for the purpose of obtaining a sample of her typewriting when using the machine that was in said room 604, and also to obtain her signature. No force was used at any time and she did this voluntarily and told me that she was glad to do it as she did not wish to stay in jail that night. I called on the telephone Assistant United States Attorney Grant and did arrange with him to have Commissioner Cotter remain in his office in order that the prisoners could be arraigned and released on bail that night. We arrived at the commissioner's office shortly after 5 p. m., and the prisoners were arraigned and released on bail that evening.

While I was in the office, the telephone rang a number of times and I answered the telephone and the various parties calling refused to identify themselves but asked for sometimes "Dan" sometimes "Sam" and sometimes asked if the "girl" was there and in one case asked for what sounded to me like "Hyman." Every time the telephone rang, I was unable to get the conversation because of the shouting of the man now known to me as Lefkowitz trying to interfere with my conversation. It was because of his continuous interfering with the agents that Special Agent Delmore at one time told him that if he didn't stop shouting and interfering, he would slap his face.

J. RAY OLIVERA.

Sworn to before me this 29th day of January, 1931.

[SEAL.] CATHERINE M. CONLAN,
Notary Public.

Bronx County No. 61, Reg. 3117. Cert. filed in N. Y. Co. No. 155, Reg. No. 1C138. Commission expires March 30, 1931.

In United States District Court

[Title omitted.]

Affidavit of Thomas Guilfoyle, read in opposition to motion.

STATE OF NEW YORK,
County of New York, ss:

Thomas Guilfoyle, being duly sworn, deposes and says:

I am a special agent of the Department of Justice, Bureau of Prohibition, working under the supervision of Horace J. Simmons, special agent in charge, sub-Treasury Building, New York City.

On January 12, 1931, I was directed by Mr. Simmons to report to Assistant United States Attorney U. S. Grant, where I would meet Special Agents Gaughan, Delmore, and Olivera at Mr. Grant's office and that they would explain to me what part I was to take in a proposed arrest of Henry Miller and others and would inform me as to the facts of the case. I did report to Assistant United States Attorney Grant and met the said special agents at his office and was given by Mr. Grant a copy of a complaint that was sworn to on January 12, 1931, by Special Agent Olivera before Commissioner Cotter and I read this complaint. Special Agents Olivera and Delmore also showed me various papers, such as letters bearing the typewritten signature of Henry Miller and referring to orders for and shipments of liquor, a bank draft bearing the endorsements among others of "Henry Miller," and as a result of this information given to me, I was informed and believed at that time that the persons named in said complaint were engaged in an unlawful conspiracy to violate the national prohibition act and were then maintaining a nuisance at room 604 in the building 1547 Broadway by selling and bartering liquor in said room.

About 3.35 p. m. Deputy United States Marshal Harry Morgenstern came to the office of Assistant United States Attorney Grant and I was informed that he had a warrant for the arrest of the persons named in said complaint that had just been issued by United States Commissioner Garrett W. Cotter. I, in the company of said deputy marshal and the other special agents, went to the building 1547 Broadway and arrived there about 4 p. m. on January 12th to assist the said deputy marshal in affecting the arrest of the persons named in the said complaint and warrant of arrest. Special Agent Gaughan, the deputy marshal, and I proceeded to the fifth floor (while Special Agents Olivera and Delmore continued to the sixth floor) of this building by elevator and continued to the sixth floor via the rear stairway. Special Agent Olivera entered room 604, while the rest of us remained on the landing on the 6th floor with the exception of Delmore who took a position near the door to room 604 in order that he could signal us by a prearranged signal if he was notified by Special Agent Olivera,

by means of a prearranged signal, that the parties or any of them named in the complaint and the warrant of arrest were in said room. I was informed by Special Agent Olivera prior to going to said building that he had an appointment for 3 p. m. on January 19th with Henry Miller in said room 604 for the purpose of discussing a possible purchase of liquor by Special Agent Olivera from Henry Miller and that Special Agent Olivera had told a man known to him as Henry Miller that his, Olivera's, name was Manuel Negroni. It was for that reason that Olivera entered the room before the rest of us, as we did not wish to disclose the fact that the warrant of arrest had been issued if the persons named in the warrant of arrest were not present in the room.

Special Agent Olivera had not been in the room more than a few minutes when Special Agent Delmore came over to the rest of us and informed us that persons named in the complaint and warrant were present in the room, according to the signal he had received from Special Agent Olivera. We all thereupon entered said room 604.

On entering the door of room 604, I observed Special Agent Olivera talking with a man now known to me as Benjamin Williams. Benjamin Williams, accompanied by Special Agent Olivera, walked towards the inner office. At the entrance to the inner office, a man was standing, who Special Agent Olivera informed us was Henry Miller, and said Olivera said to us in substance that this man standing by the entrance to the inner office was Henry Miller, with whom he had negotiated for the purchase of liquor. Deputy Marshal Morgenstern thereupon informed this man Henry Miller, who I now know to be Daniel M. Lefkowitz, that he was a deputy marshal and that he had a warrant calling for his arrest, and he placed said Henry Miller under arrest. Said deputy marshal had the warrant of arrest in his hand at this time.

Special Agent Gaughan and said Williams were having a conversation. I saw Special Agent Gaughan take from the outside overcoat pocket of said Williams a package having the appearance of a bottle wrapped in brown paper. The paper was taken off and the bottle bore a label indicating that it was rye whiskey. Williams informed us that he had purchased this liquor elsewhere and had brought it to room 604 to drink it and that he intended to give the stenographer in this office some stenographic work and that he, Williams, was in the carnival business. There was another man present in the office who we allowed to leave as we had no evidence warranting his arrest or detention.

I observed Special Agent Delmore search the person of Henry Miller (Daniel M. Lefkowitz) and hand the various papers and articles taken from his person to Deputy Marshal Morgenstern. I and the other special agents immediately upon the arrest of Henry Miller, who I will hereinafter refer to as Daniel M. Lefkowitz, conducted a search of said room 604. Said room 604 is separated by

a partition into what might be designated as an inner and outer office.

I and Special Agent Olivera searched the desk which I believe was used by Pauline Paris, who was designated in the complaint and warrant of arrest as "Jane Doe." We took from this desk, which was in the outer office near the entrance to room 604, the following:

1. Black leather covered loose-leaf note book, containing alphabetical list of names and addresses.

2. An envelope marked room 604, 1547 Broadway, New York City, containing a 1929 New York State motor vehicle registration certificate 5 Y-2555, issued to Milton Hordish, 635 Kelly Street, Bronx, N. Y., for a 1929 Nash sedan.

3. A bill or statement amounting to $25 addressed to Herman Bernstein, c/o Bernstein & Lefkowitz, 1547 Broadway, New York City, apparently sent by doctors whose names appear on the statement.

4. Business card bearing the name of Dave Scherl, giving his address and telephone number and residence telephone number.

5. A number of business cards reading as follows:

Dan Lefkowitz — Herman Bernstein

LEFKOWITZ & BERNSTEIN
1547 Broadway
New York City

Chickering 4-8928 — Room 604

6. About 25 sheets of typewriter paper with the heading thereon of "William Salmon, 1547 Broadway, room 604."

7. About 75 envelopes addressed to various persons throughout the United States, some of which contained undated letters bearing the typewritten signature "William Salmon" to the effect that he had made his yearly change of name from "Henry Miller" to "William Salmon" and that he had received a new stock of merchandise that was for sale.

8. A cardboard covered loose-leaf binder, containing an alphabetical typewritten list of names and addresses.

9. A stenographer's note book and text book.

10. Three raffle books.

While we were searching the desk, a young lady entered the office and Special Agent Olivera informed me that she was the young lady designated as "Jane Doe" in the complaint and warrant of arrest. Later, the deputy marshal came from the inner office to the outer office and Olivera informed him that she was the person designated as "Jane Doe" in the warrant. This young lady was placed under arrest. I heard Special Agent Olivera inform this young lady, who I now know to be Pauline Paris, in substance that he was sorry that she being a woman was arrested and that he would try to arrange to have the commissioner remain in his office so that she could be released on bail that night and not have to spend the night

in jail. He also had other conversation with her which I did not hear. I did see her sit down at her desk and typewrite a note which reads as follows:

ULYSSES GRANT,
Post Office Bldg., New York City.

My dear Mr. GRANT: Since everything has gone fine, I would suggest that this girl whose name is signed below be left out as soon as bail is arranged for her.

Very truly yours,

J. RAY OLIVER.

(s) PAULINE PARIS.

I later heard Olivera call Assistant United States Attorney Grant on the telephone and ask if the commissioner would be available to arraign the prisoners and heard him state in substance that it was his desire that the young lady could be released on bail and not have to spend the night in jail.

Pauline Paris voluntarily typed this letter at the request of Special Agent Olivera without any threat or force whatsoever on the part of any of the Government men. It was apparently her idea to do this in order to facilitate her release on bail. It was, of course, undoubtedly the idea of Special Agent Olivera to obtain this typewritten note in order to compare the typewriting and the stenographer's touch as disclosed on the typewritten letter with other papers found in the office and to obtain the signature of Miss Paris. He, however, at no time made any threat whatsoever to Miss Paris and actually did facilitate her early release on bail by calling Mr. Grant on the telephone and by arranging to have the prisoners taken before the commissioner as soon as possible.

I would judge that it was between 5 and 10 minutes after we first entered room 604 that Pauline Paris entered the room. In the meantime, Special Agent Olivera and myself had also searched in the outer office what I would designate as a towel cabinet. The door to this cabinet was not locked and is the usual type of cabinet with a mirror in the door and is about 15" x 12" in size. Under some towels we found several typewritten loose leaf sheets unbound bearing names and addresses of numerous people throughout the United States. Special Agent Olivera and myself also took from a waste paper basket in this outer office a number of papers and scraps of paper. No desk or cabinet was broken into by us, as all the doors to the desk and the door to the cabinet were unlocked.

Other papers and articles were found by the other special agents in room 604, including a bottle containing alcohol, but, since I didn't find these articles in the first instance, I will not enumerate them in this affidavit.

This affidavit is made by me to be submitted to the court in opposition to an application by Daniel M. Lefkowitz and Pauline Paris for the suppression as evidence of the papers and articles seized in

room 604 and the return of said articles and papers to Daniel M. Lefkowitz.

THOMAS GUILFOYLE.

Sworn to before me this 24th day of January, 1931.

[SEAL.] CATHARINE M. CONLAN,
Notary Public.

Bronx County No. 61, Reg. 3117. Cert. filed in N. Y. Co. No. 155, Reg. No. 1C138. Commission expires March 30, 1931.

In United States District Court

[Title omitted.]

Affidavit of Joseph M. Hugo, read in opposition to motion

CITY OF NEW YORK,
County of New York, ss:

Joseph M. Hugo, being duly sworn, deposes and says:

I am a special agent of the Department of Justice, Bureau of Prohibition, and I am at present a special agent in charge at the branch office located at Buffalo, New York.

On or about July 9, 1930, I was assigned by H. J. Simmons, the special agent in charge at New York City, to investigate a complaint received through the Director of Prohibition from a citizen of Oklahoma with reference to the soliciting of orders for intoxicating liquors through the United States mail by a Henry Miller, who gave the address of 1547 Broadway, room 604, New York City. I was given several letters signed in typewriting by Henry Miller, addressed to C. F. Odell, Davenport, Oklahoma, with reference to a price list of liquor and requesting orders for liquor. These letters had the letterhead "Henry Miller, 1547 Broadway, room 604, New York City," and one of the letters bore the date June 20, 1930. I also was furnished with various letters bearing a typewritten signature of B. & O. Novelty Company with a letterhead giving the address 1547 Broadway, New York City, and one of the letters with the Henry Miller letterhead had at the bottom "formerly the B. & O. Novelty." I also was furnished with several price lists of liquor which, I was informed, had been sent through the mails to said C. F. Odell by B. & O. Novelty Company and Henry Miller.

I thereupon, under date of July 15, 1930, wrote from Buffalo, New York, a letter addressed to Henry Miller, room 604, 1547 Broadway, New York City, and signed in typewriting "Anthony Craig," to the effect that I had been referred to Henry Miller by C. F. Odell and requested that a price list be sent to me. I received in reply a letter dated July 17, 1930, bearing the typewritten signature of Henry Miller and the letterhead "Henry Miller, 1547 Broadway, room 604, New York City," thanking me for my request and informing me that a price list would be sent under separate cover

and that the merchandise handled by Henry Miller was the finest obtainable in the New York market and urging me to order at once so as to take advantage of the new shipments on hand. I later received under separate cover a price list, which reads as follows:

Rye	85	French vermouth	50
Bourbon	85	Apricot brandy	85
Scotch	85	Cherry brandy	85
Bacardi	85	French brandy	85
Gin	85	Creme de minthe	85
Port	50	Creme de cocoa	85
Sherry	50	Champagne	85
Italian vermouth	50		

I thereupon, under date of July 19, 1930, wrote a letter to Henry Miller acknowledging receipt of the said letter and the price list and asked him to explain the procedure to be followed by me in ordering and in paying for the liquor. I received a reply from Henry Miller dated July 22, 1930, in which he informed me, among other things, that I should get a New York draft in advance covering the amount of any order I should send. I later received through the mails at Buffalo, New York, a letter or form announcement which reads as follows:

HENRY MILLER,
1547 Broadway, Room 604,
New York City,

DEAR PATRON: Let's all drink a toast to a better year of business for all concerned.

Now that you are back from your vacation, and I hope it was an enjoyable one, you want to keep up that glorious feeling.

I have been abroad on a shopping expedition and have brought back with me the best merchandise obtainable.

My business has steadily increased for three very good reasons—excellent service, reasonable prices, and above all, the finest quality of merchandise available. Give me an opportunity to prove to you the truth of these statements.

A revised price list will be sent to you upon request.

May I have the pleasure of serving you and your friends in the near future?

Thanking you for past favors, I remain,

Very truly yours,

HENRY MILLER.

I thereupon, under date of September 26, 1930, wrote to Henry Miller requesting the revised price list. I received a reply under date of September 30, 1930, and by separate cover a revised price list, which reads as follows:

Rye	75	French vermouth	50
Bourbon	75	Creme de minthe	75
Scotch	85	Creme de cocoa	75
Gin	85	Apricot brandy	75
Bacardi	85	Cherry brandy	75
Port	50	French brandy	75
Sherry	50	Champagne	85
Italian vermouth	50		

I later received a letter from Henry Miller dated October 23, 1930, urging me to send an order at once. Under date of October 27, 1930, I sent a letter to Henry Miller and inclosed a draft for $55.00, a copy of which letter reads as follows:

1007 Morgan Bldg.,
Buffalo, N. Y., October 27, 1930.

Mr. HENRY MILLER,
1547 Broadway, Room 604,
New York, N. Y.

DEAR SIR: Inclosed herewith please find New York draft for $55.00, for which please send me immediately one case of Scotch whiskey to the above address.

I expect to use this liquor for the Halloween holidays, so I am asking you to ship it as soon as you get this letter so that it will arrive here by Thursday, October 30th.

Please acknowledge receipt and advise me when I shall expect the express shipment.

Very truly yours,

ANTHONY CRAIG.

I received a letter in reply under date of October 28, 1930, which reads as follows:

HENRY MILLER,
1547 BROADWAY, ROOM 604,
New York City, Oct. 28, 1930.

ANTHON CRAIG,
1007 Morgan Bldg., Buffalo, N. Y.

DEAR MR. CRAIG: Your check and order received for which I wish to thank you.

Merchandise leaves to-day.

Thanking you for past favors and hoping to be of further service to you and your friends, I remain,

Very truly yours,

HENRY MILLER.

Later I got in touch with the railway express agency at Buffalo, New York, and ascertained that two packages had arrived addressed to Anthony Craig. I thereupon seized these two packages. Upon examining the contents I ascertained that they contained bottles of Scotch whiskey. I tasted the contents of one of the bottles, and as I am familiar with the color, taste, and smell of intoxicating liquor, I know that the contents of the bottle I tasted was Scotch whiskey, containing more than one-half of one per cent of alcohol by volume, fit and intended for use for beverage purposes. I took a sample of the contents of these packages to the United States chemist, who reported that the sample was distilled spirits, fit for use for beverage purposes.

I thereafter, using the name of Anthony Craig, had further correspondence with said Henry Miller and informed him that I had

not received the Scotch whiskey ordered by me. I received a letter from Henry Miller dated November 5, 1930, which reads as follows:

HENRY MILLER,
1547 BROADWAY, ROOM 604,
New York City, Nov. 5, 1930.

ANTHONY CRAIG,
1007 Morgan Bldg. Buffalo, N. Y.

DEAR MR. CRAIG: Your letter received and contents carefully noted.

I am putting a tracer on the lost shipment and will let you know within a few days the result. Meanwhile should the merchandise arrive, I would appreciate if you would write and tell me.

Thanking you for past favors and hoping that everything will be satisfactory, I remain,

Very truly yours,

HENRY MILLER.

I wrote a letter addressed to Henry Miller purporting to introduce to him one Jose Hernandez and to authorize the delivery of the liquor which I claimed had not been received at Buffalo, New York, to said Hernandez. Using the name Jose Hernandez, I went to room 604, 1547 Broadway, New York City, on November 10, 1930. I saw a young lady, who I am now informed and believe to be Pauline Paris. I gave her this letter and told her that I was a friend of Anthony Craig from Buffalo, New York; that said Anthony Craig requested me to call at room 604, 1547 Broadway, New York City, and to inquire of Henry Miller regarding the delivery of a case of whiskey which Anthony Craig had ordered and for which Anthony Craig had sent a draft for $55.00. The girl, Pauline Paris, informed me that she would get in touch with Henry Miller and tell him that Jose Hernandez had called to find out regarding the case of liquor which had not been received by Anthony Craig at Buffalo, New York. Pauline Paris then informed me that Henry Miller would probably be in the office the next day and for me to come back to said office so as to take up the matter of the lost case of liquor for Anthony Craig with Miller directly.

On November 13, 1930, accompanied by Special Agent J. Ray Olivera, I called at room 604, 1547 Broadway, New York City, and again talked with the girl, Pauline Paris. I informed her that I wanted the case of liquor which was to be delivered to me in place of the one lost in Buffalo, New York, to be delivered to Special Agent J. Ray Olivera. Pauline Paris at that time informed me that she would take this matter up with Henry Miller and for me to leave an address where the case of liquor could be delivered in New York City. She stated that Henry Miller would not care to deliver the liquor in person, but that they would be glad to send this case by express to any address I may give her. Olivera's name was not given to Miss Paris.

On January 3, 1931, accompanied by Special Agent J. Ray Olivera, I again called at room 604, 1547 Broadway, New York City. When I again talked to Pauline Paris, I introduced Special Agent Olivera to her as Manuel Negroni. I then gave Pauline Paris the address of 2026 Morris Avenue, second floor, New York City, where the case of Scotch whiskey could be delivered. She promised me that this case would be delivered any time that Negroni would specify. I then informed Pauline Paris that Manuel Negroni would like to sell this whiskey to his friends and that if it would be possible for Henry Miller to lower his price so that Negroni could make a little profit out of the proposition. Pauline Paris said that she would make arrangements with Henry Miller for a meeting with Negroni in order to discuss lower prices for the purpose of buying wholesale from Miller. Paris stated that Negroni could see Henry Miller on January 5, 1931. At this time Pauline Paris wrote a telephone number on a piece of yellow paper, which she took from the drawer of her desk, the telephone number being Chickering 4-8928. She stated that I could call this number on January 5, 1931, to arrange for a meeting between Negroni and Henry Miller.

On January 12, 1931, I received a letter in Buffalo, New York, addressed to Anthony Craig, containing a special announcement. This letter was written on stationery with the letterhead "William Salmon, 1547 Broadway, room 604, New York City," and read as follows:

"WILLIAM SALMON,
"1547 BROADWAY, ROOM 604,
"*New York City.*

"SPECIAL ANNOUNCEMENT

"DEAR SIRS: I am sending this letter to inform you that I have changed my name to the above.

"It is customary for me to do this every year.

"I also take this means of telling you that I have received new shipments of very fine merchandise and I would like to have you take advantage of same.

"This merchandise is the finest quality obtainable in the New York market at the present time at the same low prices.

"Please remember to address all communications in the future to the above name.

"Thanking you for past favors and hoping to be of further service to you and your friends in the near future, I remain,

"Wishing you a happy, healthful, and prosperous New Year.

"Very truly yours,

"WILLIAM SALMON
"(Formerly HENRY MILLER.)

"P. S.—Please inform all your friends about the change of our name."

Prior to January 12, 1931, I had informed Special Agent Olivera of the foregoing facts and information known to me.

This affidavit is made by me to be submitted in opposition to an application by Daniel M. Lefkowitz and Pauline Paris for the suppression of all evidence obtained as a result of a search of premises room 604, 1547 Broadway, New York City, and for the return of papers and articles seized at the time of the arrest of said Daniel M. Lefkowitz and Pauline Paris.

JOSEPH M. HUGO.

Sworn to before me this 24th day of January, 1931.

[SEAL.] CATHARINE M. CONLAN,
Notary Public.

Bronx County No. 61, Reg. 3117. Cert. filed in N. Y. Co. No. 155, Reg. No. 1 C 138. Commission expires March 30, 1931.

In United States District Court

[Title omitted.]

Affidavit of Laurence Delmore, Read in Opposition to Motion

STATE OF NEW YORK,
County of New York, ss:

Laurence Delmore, being duly sworn, deposes and says:

I am a special agent of the Department of Justice, Bureau of Prohibition, working under the supervision of Horace J. Simmons, special agent in charge, Sub-Treasury Building, New York City.

A few days prior to January 6, 1931, I was informed by Special Agent Olivera that he had made arrangements whereby a case of Scotch whiskey would be delivered to him at an address in the Borough of Bronx, New York City, by a man, and that he, Olivera, had previously visited room 604 in a building known as 1547 Broadway and had arranged there with a man known to him as Henry Miller and a young lady in the office for the delivery of this whiskey which was to be delivered on January 6, 1931. Special Agent Olivera and myself went to the Bronx address on January 6, but the whiskey was not delivered.

On January 9, 1931, I went to the 6th floor of the building 1547 Broadway, New York City, and saw on the entrance to room 604 on a panel in the door the following:

The Southern Agency, D. M. Lefkowitz

A few days prior to January 12, 1931, I was informed by Special Agent Olivera that he had made an appointment to meet Henry Miller at room 604 in the building 1547 Broadway, New York, on

January 12, 1931, at 3.00 p. m. Special Agent in Charge Horace J. Simmons was kept informed by us as to the developments of the case and he advised us on January 10th to present the matter to the United States attorney. On January 12th Special Agent Olivera and myself went to the United States attorney's office and informed Assistant United States Attorney U. S. Grant as to all the facts known to us. I, at this time, had examined various letters bearing the typewritten signature of Henry Miller addressed to a C. F. Odell at Davenport, Oklahoma, with reference to price lists of liquor and soliciting orders for liquor. I also have been informed by Special Agents Olivera and J. M. Hugo with respect to the transaction between said Hugo using the name Anthony Craig and Henry Miller, and the order of a case of liquor to be sent to Buffalo and the seizure of the case of liquor that had been sent to Buffalo as a result of the order given to Henry Miller at room 604 in the building 1547 Broadway, New York City, by Special Agent Hugo, and the conversations had between Special Agent Olivera and the girl, whose name at that time I didn't know, and this man Henry Miller, which conversations are referred to in the complaint sworn to by Special Agent Olivera before Commissioner Garrett W. Cotter on January 12th. I now know the girl to be Pauline Paris and the man's real name to be Daniel M. Lefkowitz.

Assistant United States Attorney Grant, after being informed of the facts of the case, dictated a complaint in our presence and with our assistance. This complaint was sworn to by Special Agent Olivera before Commissioner Cotter and a warrant of arrest was issued to effect the arrest of the persons named in the complaint.

By reason of the aforesaid, prior to going to room 604 in the building 1547 Broadway, on January 12th, I was informed and believed that the said Daniel Lefkowitz, whose real name I did not at that time know, and the said girl, Pauline Paris, whose name at that time I did not know, and the other persons named in the said complaint were engaged in an unlawful conspiracy to violate the national prohibition act and were maintaining a nuisance in said room 604 by the use of said room for the sale and bartering of intoxicating liquor.

The warrant of arrest was delivered to the acting United States marshal, and Deputy Marshal Morgenstern was assigned to execute the warrant. He and myself and Special Agents Olivera, Gaughan, and Guilfoyle left the Federal building about 3.35 p. m. and went to 1547 Broadway, New York City. Said Deputy Marshal Morgenstern had in his possession the warrant of arrest and the special agents accompanied him to assist him and to identify the persons named in the warrant of arrest.

Entering the building at 1547 Broadway at about 4.00 p. m., we proceeded by elevator to the 5th floor, where U. S. Deputy Marshal Morgenstern and Special Agents Gaughan and Guilfoyle got off.

Agent Olivera and I continued to the 6th floor and I saw him enter room 604, and as he entered he took off his hat, thus notifying me that the persons we expected to find were in that room. I immediately went down the stairs to the 5th floor returning again to the 6th floor via the rear starway and finding at the head of the stairs the marshal and the other special agents. We all then entered room 604. From the time that Olivera entered room 604 until the rest of us entered, it was probably not more than two minutes. As I entered room 604, a man who later identified himself as Benjamin Williams was just leaving. I asked him to step back into the office and Agent Gaughan then questioned him. I heard Agent Olivera tell the marshal that the man who was standing at the door of the partition was Henry Miller. The marshal asked Miller to step into the inner office where he placed Henry Miller under arrest. At this time I was not sure that this man's correct name was Henry Miller. I, therefore, said to him, "Give me your correct name," and he said that he was Daniel Fefkowitz. I said, "Are you Daniel or Sam Fefkowitz," and he said, "No; Sam is my brother." I thereupon searched Henry Miller (Daniel Lefkowitz) and found in his pockets the following miscellaneous assortment of papers:

One wallet containing the following:

2 blank envelopes.
1 telephone book containing 1 address.
5 pieces of paper (initialed JAP).
26 yellow order slips.
27 white order slips.
4 white order slips.

One pocket wallet containing the following:

17 business cards, Lefkowitz & Bernstein.
1 lodge card, Consistory of New York City 32.
1 " " Ceba Lodge, No. 954.
1 " " Tall Cedars of Lebanon.
1 " " Mecca Temple.
3 small photographs.
1 pawn ticket.
1 operator's license.

And also the following not in the wallets:

1 Yale key.
1 check for $211.75.
1 letter dated Jan. 8, 1931.
1 letter dated Dec. 30, 1930.
3 yellow letters dated Jan. 5, 1931, and Jan. 9, 1931.

Also a Sargent key, No. 604, which I tried in the lock of the door to room 604 and found that it was the proper key. All of the papers and key were placed in an envelope on which Mr. Lefkowitz wrote his name. This envelope was given to the marshal.

Lefkowitz asked me on several occasions while I was in room 604 and also while in the subway if I couldn't fix the case so that he would not be prosecuted because he was only operating on a small scale. He told me it would be worth my while and said that if I needed any whisky, he would be glad to send me a case if I would return to him a check for $211.75 that I had taken out of his pocket. I told Lefkowitz that I was a Government agent and that anything he said could be used against him, and if he were not careful, the marshal would place him under arrest for bribery.

A woman, who later identified herself to me as Pauline Paris, had entered the office between 5 and 10 minutes after we first entered the office and I asked her to give me some information in reference to her business in the office. I told her that it was her privilege to either answer my questions or refuse, as the law gave her that choice. She stated that she had no objection to making a statement in reference to her name, occupation, and address, but did not desire at that time to make any further statement. While I was questioning her, Lefkowitz kept interrupting our conversation, some of his remarks being addressed to Pauline Paris and being of a nature that would tend to distort her statements to me. After questioning Miss Paris, I questioned the man whom I had met as I entered room 604, and he told me that his name was Benjamin Williams. He said that he was just a visitor in room 604. Agent Gaughan showed me a bottle of whisky which he said was taken from the pocket of Mr. Williams.

After questioning Mr. Williams, I informed Mr. Lefkowitz that I desired him to make a statement but that he need not unless he so desired, as he could stand on his constitutional rights and refuse to answer any of my questions. He, therefore, refused to answer any of my questions with the exception that he told me he resided at 698 West End Avenue, New York City. (He later gave his bondsman his home address as 670 West End Avenue, New York City.) I asked Lefkowitz if he knew Agent Olivera, and he said, "Yes, I remember him. I've been suspicious of him and thought he was a Federal man when he was in here before. I even told the stenographer that he looked suspicious." During the course of my conversation with said Lefkowitz, he referred to the aforementioned appointment he had with Special Agent Olivera by stating to me "I expected him at 3 o'clock," and he further said that he would have had more confidence in Olivera if he had kept the appointment and allowed the deal for the five cases of liquor to go through. Later, in the subway, Lefkowitz said to me in substance that Olivera would have a hard time proving that he was Henry Miller, but that if Olivera had let the five cases go through, it would have been easy to establish Lefkowitz's identity as Miller, as he would then have complete confidence in Olivera.

While in room 604 Agent Olivera showed me a typewritten letter addressed to Mr. Grant, assistant U. S. attorney, with the name Pauline Paris written thereon. He said Pauline Paris had typewritten it at his request. Agent Olivera handed me the contents of two waste-paper baskets while we were in room 604, and later at the office of the special agents I pieced some of the torn scraps of paper together, these being listed as follows:

Edison Company electric light bill from October 31 to December 3, 1930, for room 604 at 1547 Broadway, reading No. 6223, bill addressed to Herman Bernstein at 1547 Broadway.

Edison Company electric light bill from December 3, 1930, to January 5, 1931, for room 604 at 1547 Broadway, reading No. 6248, bill addressed to Herman Bernstein at 1547 Broadway.

Unsigned letter from Lefkowitz & Bernstein, 1547 Broadway, to L. Lieberman, 34 E. 12th Street, New York City, for merchandise delivered, $80.

Some 32-odd salesmen's order slips for intoxicating liquor with customers' names and addresses.

N. Y. Telephone Co. receipt No. 6225 dated January 8, 1931, acknowledging having received from Daniel Lefkowitz sum of $14.26 for telephone service, Chic. 4-8928.

A pencil memorandum containing some 35 names with amounts set after the respective names, some of these names being Myers, Gordon, French, and K.

A pencil memorandum containing names with amounts set after the names, one of them being Dan, $537, the total amount of the memorandum being $1,497.95.

The deputy marshal accompanied by his prisoners and the special agents all proceeded to United States Commissioner Cotter's office, where the prisoners were arraigned and held for hearing.

I saw Agent Olivera search the desk in the inner office and from one of the drawers he took out a bottle partly full of alcohol, also a telephone address book containing names of persons and telephone numbers and a business card which was taken from one of the drawers in said desk. A blank order book with some of the slips torn out was also taken from one of the drawers of the desk by Special Agent Olivera. Several business cards of Bernstein & Lefkowitz were also taken from the desk.

I am informed by Special Agent Thomas F. Gaughan and believe that he is ill from lung trouble and must go to Saranac Lake immediately and is not available to make an affidavit in this case. I have obtained photostatic copies of the complaint sworn to by Special Agent Olivera on January 12th and of the warrant issued by Commissioner Cotter which photostatic copies are annexed hereto. At the time the warrant was executed it did not contain the true names of the defendants arrested or the name of Benjamin Williams

or the return of the marshal. The complaint did not contain the name of Benjamin Williams. The complaint and warrant was amended by Commissioner Cotter at the time of the arraignment of the defendants after their arrest on January 12th.

I read the affidavit of Daniel M. Lefkowitz sworn to January 21, 1931, and note several statements therein which are to my knowledge untrue. It is stated in said affidavit "Your deponent's person was then forcibly searched without his consent and over his objection. Deponent stated to the agents and particularly to Mr. Olivera that he had no right to search him. One of the agents retorted that the deponent should keep quiet or he would have his face slapped." I was the one who searched Daniel M. Lefkowitz after he had been informed by the deputy United States marshal that he had a warrant calling for his arrest. No force was used by me in searching Lefkowitz; he did not protest or resist, and he was not told that he would get his face slapped if he didn't keep quiet. Subsequent to the search of this person, I did tell him that I would slap his face if he didn't stop interfering with me in my questioning of Pauline Paris. I didn't really intend to slap his face, but I told him this in order to keep him quiet and to stop him from annoying me and the agents in the performance of their duties. That this remark was not passed at the time of the search of his person is shown by the fact that Pauline Paris in her affidavit states that she heard the remark made and Pauline Paris was not present at the time I started to search Daniel Lefkowitz, but came in the room later. Neither the deputy marshal nor the other special agents stated that they had a search warrant. The deputy marshal informed Daniel Lefkowitz that he had a warrant of arrest, but no claim was made that the agents or the deputy marshal had a search warrant. The search was made as an incident to the arrest. Daniel Lefkowitz also states in his affidavit that a check was obtained from the inner office. This check was taken by me from the person of Dan Lefkowitz, who, as a matter of fact, endeavored to hide this check by passing it from one hand to another behind his back and showing me each of his hands as being empty.

This affidavit is made by me to be submitted to the court in opposition to an application by Daniel M. Lefkowitz and Pauline Paris for the suppression as evidence of the papers and articles seized in room 604 and the return of said articles and papers to Daniel M. Lefkowitz.

LAURENCE DELMORE.

Sworn to before me this 28th day of January, 1931.

DAVID D. MARCUS,
Notary Public, N. Y. Co., #1077.

Complaint before Commissioner Cotter, annexed to affidavit of Laurence Delmore

Approved: Ulysses S. Grant, Assistant United States Attorney.
Before: Honorable Garrett W. Cotter, United States Commissioner for the Southern District of New York.

UNITED STATES OF AMERICA

against

HENRY MILLER, "JANE DOE," THE SAID NAME BEING FICTITIOUS, "Richard Roe," the said name being fictitious, and "John Doe," the said name being fictitious, amended to include Benjamin Williams, defendants

Complaint. Section 37 U. S. C. C. and Act of October 28, 1919

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

J. Ray Olivera, being duly sworn, deposes and says:

I am an officer, to wit, special agent of the Bureau of Prohibition, Department of Justice, attached to the office of the special agent in charge at New York city, and on information and belief charge:

That commencing on or about June 21, 1930, and continuing thereafter down to the present time, at the southern district of New York and within the jurisdiction of this court, Henry Miller and "Jane Doe," the said name being fictitious and her true name to the deponent is unknown (she being a young lady about 25 years of age, fair skinned, apparently Jewish, slender, and weights about 120 pounds, about 5′ 5″ in height, and her face is slightly pock-marked), and "Richard Roe," the said name being fictitious and his true name being to the deponent unknown (he being a man about 35 years of age, apparently Jewish, smooth shaven, fair skinned, about 5′ 11″ in height and heavy set), and "John Doe," the said name being fictitious and his true name being to the deponent unknown (he being a man about 40 years of age, apparently Jewish, rather short of stature and stocky in build, clean shaven and fair skinned), also Benjamin Williams, the defendants herein, unlawfully, wilfully, and knowingly did combine, conspire, confederate, and agree together and with each other and with divers other persons to the deponent unknown, to commit an offense against the United States, to wit, to sell, possess, transport, furnish, deliver, and to take orders for intoxicating liquor containing more than one-half of one per cent of alcohol by volume and fit and intended for use for beverage purposes without permits, and contrary to the provisions of and otherwise than as authorized by the act of Con-

gress of October 28, 1919, commonly known as the national prohibition act and acts amendatory thereof and supplemental thereto and regulations issued and promulgated under the provisions of said act.

It was a part of said conspiracy that the defendants Henry Miller, "Jane Doe," the said name being fictitious, "Richard Roe," the said name being fictitious, and "John Doe," the said name being fictitious, should solicit through the United States mails and by other means, from an office in room 604 in a building known as 1547 Broadway, New York city, the said defendants pretending to do a real estate business in said office under the name of "The Southern Agency—D. M. Lefkowit," which name appears on the outer door to said room, orders for intoxicating liquor from divers persons throughout the United States, and should arrange to have intoxicating liquor sent and delivered by express companies, automobiles, and other carriers to the purchasers of said liquor, to collect money in payment for said liquor, and to share in the proceeds of said illegal scheme.

OVERT ACTS

1. In pursuance of said conspiracy and to effect the objects thereof, on or about June 8, 1930, at the southern district of New York and within the jurisdiction of this court, the defendant Henry Miller mailed and caused to be mailed a letter to C. F. Odell at the Davenport State Bank, Davenport, Oklahoma, a copy of which letter marked "Exhibit A" is annexed hereto and made a part hereof.

2. In pursuance of said conspiracy and to effect the objects thereof, on or about June 20, 1930, at the southern district of New York, and within the jurisdiction of this court, the defendant Henry Miller mailed and caused to be mailed a letter addressed to C. F. Odell at the Davenport State Bank, Davenport, Oklahoma, a copy of which marked "Exhibit B" is annexed hereto and made a part hereof.

3. In pursuance of said conspiracy and to effect the objects thereof, on or about January 3, 1931, in room 604 of the building known as 1547 Broadway, borough of Manhattan, city, county, State, and southern district of New York, and within the jurisdiction of this court, the defendant "Jane Doe" had a conversation with deponent with reference to a past delivery of liquor by defendants to a special agent using the name Anthony Craig and with reference to prices of liquor that could be furnished by defendants and possible future deliveries of liquor to deponent.

4. In pursuance of said conspiracy and to effect the objects thereof, on or about January 5, 1931, at said room 604 of the building known as 1547 Broadway, in the southern district of New York, the defendant Henry Miller in the presence of the defendants "Richard Roe" and "John Doe" had a conversation with deponent with reference to a past delivery of liquor by defendants to a special agent

using the name Anthony Craig at Buffalo, New York, and a possible future shipment of liquor to deponent who, at that time, used the name of Manuel Negroni.

5. In pursuance of said conspiracy and to effect the objects thereof, on or about January 7, 1931, at the southern district of New York and within the jurisdiction of this court, the defendants transported and caused to be transported one case of Scotch whiskey containing more than one-half of one per cent of alcohol by volume and fit and intended for use for beverage purposes.

6. In pusuance of said conspiracy and to effect the objects thereof, on or about January 9, 1931, at the southern district of New York and within the jurisdiction of this court, the defendant "Richard Roe" had a telephone conversation with deponent with reference to past deliveries and possible future sales and deliveries by the defendants to deponent of intoxicating liquor from defendants.

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

The sources of deponent's information and the grounds of his belief are an official investigation made by him in the course of his official duties in the the course of which investigation he ascertained and now has knowledge of the following:

I have examined a letter sent by a resident of the State of Oklahoma under date of June 28, 1930, to the Director of Prohibition informing him of various correspondence passing between the defendant Henry Miller, the B. & O. Novelty Company, and a Mr. C. F. Odell, formerly vice president of the Davenport State Bank at Davenport, Oklahoma, during the year 1927 and certain letters, copies of which marked "Exhibits A and B" are annexed hereto, addressed to C. F. Odell by the defendant, Henry Miller. I have read the correspondence referred to, which is at the present time in my possession, and said correspondence, aside from the letters, copies of which are annexed hereto, consists of letters from the B. & O. Novelty Company soliciting orders for intoxicating liquor from C. F. Odell and price lists sent to C. F. Odell and shipments of liquor to C. F. Odell and others by the B. & O. Novelty Company located at the time of this correspondence at 1547 Broadway, New York City. I have also read official reports of Special Agent J. M. Hugo and have talked personally with J. M. Hugo and have been informed by him that he, using the name of Anthony Craig, had various correspondence with Henry Miller, which correspondence is at the present time in my possession and consists of letters from Henry Miller soliciting orders for intoxicating liquor from said Hugo using the name of Anthony Craig, letters referring to a shipment of liquor made by Henry Miller to Anthony Craig on or about October 28, 1930, and a copy of one of which letters marked "Exhibit C" is annexed hereto and made a part hereof. Said Special Agent Hugo informed me that he had made the said purchases of

intoxicating liquor using the name Anthony Craig and that he had received at Buffalo, New York, twelve (12) bottles of Scotch whiskey. I have examined a report of the chemist in charge at New York City with reference to an analysis made of the contents of one of said bottles, said report showing it to be distilled spirits fit for use as a beverage.

I also have examined a photostatic copy of a blank draft which said Special Agent Hugo informed me he sent to said Henry Miller in payment for said liquor and the name "Henry Miller" appears on said draft as one of the endorsers of said draft.

At various times during the present month of January, 1931, I have had conversations with the defendant, Henry Miller, with reference to said shipment of liquor to Anthony Craig and with reference to possible future shipments of liquor to me. At the time of these conversations, I used the name Manuel Negroni. Said Henry Miller has acknowledged to me that he received the order for this liquor from Anthony Craig. I and Special Agent Hugo pretended to Henry Miller that said liquor had not been received, and I arranged with the defendants, Henry Miller and "Jane Doe," for a shipment to be made to me as a representative of Anthony Craig at New York City in the place of the said shipment of liquor that had been made to Buffalo which was represented by us as having been lost. A shipment of intoxicating liquor was made to a certain address in the southern district of New York by defendants, the identity of the persons actually transporting the liquor being to the deponent unknown. Said liquor was seized and a chemical analysis made by the United States chemist in charge at New York City shows it to be intoxicating liquor containing more than one-half of one per cent of alcohol by volume and fit for beverage uses. I tasted some of said liquor and am familiar with the taste, color, and odor of whiskey and distilled spirits, and know that what I tasted was intoxicating liquor fit for use for beverages purposes.

At the time of one of my conversations with Henry Miller in room 604 in the building known as 1547 Broadway, New York City, the defendants "John Doe" and "Richard Roe" were present and must have overheard most of the conversation and while I was in the office at that time, I overheard the defendant "Richard Roe" ordering, after consulting the defendant Miller with reference to the order, three cases of liquor over the telephone from some one whose identity is unknown to me. During one of my conversations with the defendant "Jane Doe," she informed me that she could take orders for intoxicating liquor from me.

On the outer door to said room 604, I saw as late as January 5, 1931, the following warning:

The Southern Agency
D. M. Lafkowit

The "D" in front of the M. Lafkowit is somewhat scratched, giving it the appearance of a "C," but I believe it was intended to be a "D."

I have also made other investigations and the facts ascertained by me support the charge herein that the said defendants are engaged in a conspiracy to violate the national prohibition act.

Wherefore deponent prays that a warrant may issue for the apprehension of the said defendants and that they may be imprisoned or bailed as the case may be.

J. RAY OLIVERA,
Special Agent, United States Department of Justice.

Sworn to before me this 12th day of January, 1931.

GARRETT W. COTTER,
United States Commissioner for the Southern District of New York.

A true copy.

GARRETT W. COTTER,
United States Commissioner for the Southern District of New York.

Exhibit A, annexed to complaint before Commissioner Cotter

HENRY MILLER,
1547 BROADWAY, ROOM 604,
New York.

DEAR SIR: Not having heard from you in some time, we are taking this means of informing you of the new supply of choice merchandise consisting of both foreign and domestic brands. This merchandise is far superior to any that we have ever offered to you.

We are notifying our oldest customers first so as to give them the advantage of obtaining some before our supply is exhausted. Let your friends know of this so that they, too, can benefit by it.

Thanking you for past favors and hoping to be of further service to you in the very near future, I remain,

Very truly yours,

HENRY MILLER,
(Formerly the B. & O. Novelty.)

Exhibit B, annexed to complaint before Commissioner Cotter

HENRY MILLER,
1547 BROADWAY, ROOM 604,
New York, June 20, 1930.

C. F. OUELL,
The Davenport State Bank,
Davenport, Okla.

DEAR SIR: Your request received, for which I wish to thank you. I am sending you my price list under separate cover. The merchandise I handle is the finest obtainable in the New York market

and I would advise you to order immediately so as to take advantage of the new supply I have on hand.

Thanking you for past favors and hoping to be of further service to you in the near future, I remain,

Very truly yours,

HENRY MILLER.

Exhibit C, annexed to complaint before Commissioner Cotter

HENRY MILLER,
1547 BROADWAY, ROOM 604,
New York City, Oct. 28, 1930.

ANTHON CRAIG,
1007 Morgan Bldg.,
Buffalo, N. Y.

DEAR MR. CRAIG: Your check and order received, for which I wish to thank you.

Merchandise leaves to-day.

Thanking you for past favors and hoping to be of further service to you and your friends, I remain,

Very truly yours,

HENRY MILLER.

Warrant of arrest, annexed to affidavit of Laurence Delmore

The President of the United States of America

To the marshal of the United States for the Southern District of New York, and to his deputies, or any or either of them:

Whereas complaint on oath hath been made to me, charging that Henry Miller, "Jane Doe," "Richard Roe," "John Doe" did on or about the 21st day of June in the year one thousand nine hundred and/30 at the southern district of New York (Offense. Vio. Sec. 37 U. S. C. C.) as set forth in the complaint this day filed in my office, a certified copy of which is hereto attached, and made a part hereof, against the peace of the United States and their dignity, and against the form of the statute of the United States in such case made and provided, act 10/28/19.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said defendants and bring their bodies forthwith before me, or some judge or justice of the United States, wherever in the southern district of New York they may be found that they may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 12th day of January in the year of our Lord one thousand nine hundred and/31.

GARRETT W. COTTER,
United States Commissioner
for the Southern District of New York.

U. S. District Court, Southern District of New York. The United States of America *v.* Henry Miller, Daniel Lefkowitz, $3,000; Jane Doe, Pauline Paris, $1,000; John Doe, Richard Roe, Benjamin Williams, $500. Warrant to apprehend. Garrett W. Cotter, U. S. Commissioner, S. D. N. Y.

I hereby depute Harry Gargachan to execute the within process. Dated, New York, Jan. 12, 1931. R. J. Mulligan, U. S. Marshal.

Received this warrant 12th day of January, 1931, at New York City and executed the same by arresting the within named Henry Miller and Daniel Lefkowitz, Pauline Paris, Benjamin Williams at New York City, on the 12th day of January, 1931, and have their bodies now in court, as within I am commanded. R. J. Mulligan, U. S. Marshal, S. D. N. Y.

Defendants Lefkowitz arraigned 1/12/31; hearing 2/10/31, $2,000; Pauline Paris, $1,000; Williams, $500. Garrett W. Cotter, U. S. Commissioner.

Defendants gave bail 1/12/31. Garrett W. Cotter, U. S. Commissioner.

In United States District Court, Southern District of New York

IN THE MATTER OF THE APPLICATION OF DANIEL M. LEFKOWITZ, FOR the suppression of any and all evidence of whatever nature, obtained directly or indirectly by reason of a search of premises room #604 in #1547 Broadway, in the Borough of Manhattan, City and State of New York, and for the return of all books, papers, correspondence and all other papers and records belonging to the said Daniel M. Lefkowitz, et cetera.

M 13/367

Opinion of Caffey, U. S. D. J.

Counsel have presented the issues with commendable frankness and in a co-operative spirit. They disagree as to the significance to be attributed to Go-Bart Importing Co. *v.* United States, 51 Sup. Ct. 153; 75 L. ed. 185. They want a square ruling as to its effect. As I understand, whoever the loser, there will be a review of my order. The matter is important to citizens, as well as to law officers. All should know where they stand. Accordingly, I have been over the motion papers and the authorities with such care as was practicable in the limited time available and shall render a prompt

decisions though, in view of the prospective appeal, I see no need for extended discussion.

The complaint charges a felony under section 37 of the Criminal Code and section 21, Title II of the national prohibition act. (18 U. S. C. A., sec. 88; 27 *Ibid.*, sec. 33.) The warrant directed the marshal to arrest for this felony the petitioner Lefkowitz (under the name of Henry Miller) and the petitioner Paris (under the name Jane Doe). The Government agent who verified the complaint had personal knowledge which afforded reasonable ground for believing that the petitioners were maintaining and were conspiring among themselves and others to maintain a nuisance, in violation of the Volstead Act, in room 604 at 1547 Broadway, Borough of Manhattan. In addition, in advance of taking the oath, the agent had information to the same end from others, who had personal knowledge of the commission and continuance of the offense by the petitioners, and from various substantiating documents in his possession.

I think on the proof the following are plainly established: The complaint and the warrant of arrest based thereon were regular and sufficient. The petitioners were properly and lawfully arrested by a deputy marshal pursuant to the authority vested in him and the duty imposed on him by the warrant. Room 604 was the place in which the arrest was made and the papers, whose return is sought, were located. This place constituted but single premises, consisting of the so-called inner and outer offices, in which the offense was being committed. The offense charged in the complaint was actually in progress and was being participated in by both petitioners, in room 604, at the time they were arrested. None of the papers were seized until after the execution of the warrant. Omitting for the moment the letter typed by Paris, part of the papers (specifically identified in the affidavits) were taken from the person of Lefkowitz and the remainder from the premises, where the arrest occurred, as an incident thereto. Save as to those already redelivered to petitioners, all the documents would be material evidence at the trial of the indictment which resulted from the arrest.

The seizure as an incident, during the course and within the place of a lawful arrest for a felony of papers found on the person arrested (Agnello *v.* United States, 269 U. S. 20), as well as of papers on the premises where the arrest was made which were either contraband (Carroll *v.* United States, 267 U. S. 132) or were then being employed in carrying on the criminal enterprise for which the arrest was made (Marron *v.* United States, 275 U. S. 192), is lawful.

The United States attorney has produced all the seized papers (except those previously returned) and I have examined them. Within the authorities cited above I discover none whose retention by the prosecuting officer I regard as unlawful.

I think that, upon application of common sense, the conclusion is inescapable that each paper taken was, within the meaning of sections 21 and 22 of Title II of the prohibition act (27 U. S. C. A.,

secs. 33 and 34), "property kept and used in maintaining" was located in the place where there was being maintained and was a thing "used in connection with the violation * * * constituting" the nuisance denounced by the law. The physical presence of intoxicating liquor in room 604 was not essential to the commission there of the crime, charged in the complaint, for which the arrest was made. The place could be a nuisance although there was never actually any liquor on the premises. Within the statute, liquor could be sold there, though deliveries were made elsewhere. Moreover, for the present purpose it is enough if the conspiracy was there or the petitioners or their associates had any of them gathered in the room to conduct the conspiracy or do any act to effect its object.

It might well follow that, in the sense of the word as used in the Carroll case, supra, the seized papers were contraband. It is not necessary, however, to determine that, for the reason that, at least within the Marron case, all the papers were but usual and ordinary means of carrying on a business of the character presented here.

Much stress was laid in argument on the Go-Bart case. Each side claimed to benefit by it. I think, however, that what was there said is to be confined to the facts then under consideration and that it has no pertinency to the facts in the case at bar. I feel strongly that it was not the intention of the Supreme Court to depart from well settled principles, theretofore announced by it in a long line of decisions. At any rate, I am unwilling to construe the case otherwise unless constrained thereto by the court of appeals for this circuit.

I am satisfied that the letter addressed to the assistant United States attorney, referred to in the affidavit of the petitioner Paris, was voluntarily typed and signed by her. Though doubtless she did not suspect the use as evidence for which it was designed by the Government agent who obtained it, she readily fell in with his suggestion, with the purpose on her part of securing arraignment and bail before the United States commissioner left his office for the day and thereby to escape confinement in jail over night. It is immaterial that the agent had an ulterior motive. He employed no force and he was not guilty of any such surreptitious or prohibited device as that which Couled *v.* United States, 255 U. S. 298, held tainted evidence so as render it inadmissible. On the contrary, what was done by the agent, being free from force, was well within the realm which, in United States *v.* Maresca, 266 Fed 713, 718–19, Judge Hough said was open to law officers in procuring evidence.

All the papers were put into the hands of the deputy marshal at the time of the arrest. He delivered them to the United States attorney, who still holds them. There is no occasion therefore for making anybody except the United States attorney a respondent in this proceeding. (United States *v.* Gowen, 40 Fed. [2d] 593, 598; United States *v.* Maresca, supra.) Moreover, there is no justi-

fication for continuing a stay against others named in the order to show cause, none of whom is in possession of any of the papers or has been served with process. (United States *v.* Mahon, 42 Fed. [2d] 571, and cases cited.)

There is some dispute as to whether there was consent, express or implied, by petitioners or either of them to the search of the premises after the arrest. I should be unwilling to find that they did consent without an oral hearing at which the witnesses can be fully cross-examined. If such a hearing be desired, it may be obtained by placing the matter on the calendar of the criminal part for February 20. If that time be not convenient; another date will be arranged.

The application by the United States attorney at the oral argument on the 10th instant for a modification of the existing stay is granted. An order (to be settled on one day's notice) may be taken vacating the stay except as against the United States attorney using the seized papers as evidence in a trial of the petitioners or either of them previous to ten days after the entry of an order hereon and, if during that period an appeal be taken, until after determination of the appeal.

Motion denied. Settle order on two days' notice.

Dated, February 13, 1931.

FRANCIS G. CAFFEY,
U. S. D. J.

In United States District Court

[Title omitted.]

Order Amending Title of Proceeding

February 17, 1931

Upon the stipulation and consent of David P. Siegel, attorney for the petitioners, and the United States attorney, by Ulysses S. Grant, assistant United States attorney, of counsel, the attorneys for the respective parties herein orally made before me at the time of the argument of the motion brought on to be heard before me on February 10, 1931, by an order to show cause issued upon the application of Daniel M. Lefkowitz and Pauline Paris, the petitioners herein, for an order directing the return of certain papers seized at the time of the arrest of the petitioners on January 12, 1931, and for the suppression of their use as evidence; it is

Ordered that the title of this proceeding be and the same hereby is amended so as to include the name of Pauline Paris as one of the petitioners herein.

FRANCIS G. CAFFEY,
U. S. D. J.

In United States District Court, Southern New York

IN THE MATTER OF THE APPLICATION OF DANIEL M. LEFKOWITZ AND Pauline Paris, for the suppression of any and all evidence of whatever nature, obtained directly or indirectly by reason of a search of premises room #604 in #1547 Broadway, in the Borough of Manhattan, City and State of New York, and for the return of all books, papers, correspondence and all other papers and records belonging to the said Daniel M. Lefkowitz, et cetera.

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, respondent

M 13/367

Order Appealed From

February 17, 1931

A motion by Daniel M. Lefkowitz and Pauline Paris, the petitioners herein, made by an order to show cause directed to the United States attorney, and signed by Honorable Henry W. Goddard, a United States district court judge, on January 21, 1931, for an order for the suppression of any and all evidence of whatever nature obtained directly or indirectly by reason of a search of premises room #604, in #1547 Broadway, in the Borough of Manhattan, City of New York, on the 12th day of January, 1931, and for the return of all books, papers, correspondence and other papers, records and things belonging to the said Daniel M. Lefkowitz, and why an order should not be made herein for such other and further relief as to this court may seem just and proper, duly came on to be heard before me on February 10, 1931, the motion having been adjourned to that date;

And the affidavit of Daniel M. Lefkowitz, sworn to January 21, 1931, and the affidavit of Pauline Paris, sworn to January 20, 1931, having been submitted in support of said motion; and the affidavits of Ulysses S. Grant, sworn to January 31, 1931; Harry Morgenstern, sworn to January 28, 1931; J. Ray Olivera, sworn to January 29, 1931; Thomas Guilfoyle, sworn to January 24, 1931; Joseph M. Hugo, sworn to January 24, 1931, and Laurence Delmore, sworn to January 28, 1931, and the papers and things seized by the Government officers in room 604 in the building 1547 Broadway, Borough of Manhattan, City and State of New York, at the time of the arrest of the petitioners in said room on January 12, 1931, with the exception of the papers that have heretofore been returned to the petitioner Daniel M. Lefkowitz by the United States attorney, as appears in the said affidavit of Ulysses S. Grant, all of which papers and things are referred to and enumerated in the said affidavits

submitted in opposition to said motion, having been presented in opposition to said motion;

Now, upon hearing David P. Siegel, Esq., attorney for the petitioners, in support of said motion, Robert E. Manley, Esq., the then acting United States attorney by Ulysses S. Grant, assistant United States attorney, of counsel, in opposition to said motion, and upon reading the said order to show cause, affidavits, and papers and things submitted in support of and in opposition to said motion; and due deliberation having been had and the opinion of the court filed; and George Z. Medalie, Esq., having, since the argument of said motion, been sworn in as United States attorney for the southern district of New York; it is

On motion of George Z. Medalie, Esq., United States attorney for the southern district of New York,

Ordered and adjudged that the petitioners' said motion for the return of seized books and papers, et cetera, and the suppression of their use as evidence be, and the same hereby is, denied; and that this proceeding be, and the same hereby is, dismissed; and it is further

Ordered that the execution of this order be stayed for a period of ten (10) days from the entry hereof, and if an appeal be taken within said ten (10) day period, then pending the determination of the appeal to the extent and only to the extent provided in the order signed by me and heretofore entered herein modifying the stay included in said order to show cause signed by Judge Henry W. Goddard on January 21, 1931, to wit, that the United States attorney be, and he hereby is, for the period herein stated, stayed from using the papers and things seized by the Government officers in room 604 of the building 1547 Broadway, Borough of Manhattan, City and State of New York, at the time of the arrest of the petitioners in said room on January 12, 1931, as evidence in a trial of the petitioners or either of them.

FRANCIS G. CAFFEY,
U. S. D. J.

In United States District Court

[Title omitted.]

Order modifying stay

Feb. 17, 1931

An order to show cause having been issued herein upon the application of Daniel M. Lefkowitz and Pauline Paris, the petitioners herein, on January 21, 1931, by Honorable Henry W. Goddard, a United States district court judge, directed to the United States attorney for the southern district of New York, upon the affidavits of the said petitioners and providing that the United States attor-

ney show cause at a stated term of this court on January 26, 1931, why an order should not be made herein for the suppression of any and all evidence of whatever nature, obtained directly or indirectly by reason of a search of premises room #604 in #1547 Broadway, in the Borough of Manhattan, City of New York, on the 12th day of January, 1931, and for the return of all books, papers, correspondence, and other papers, records, and things belonging to the said Daniel M. Lefkowitz, and why an order should not be made herein for such other and further relief as to this court may seem just and proper; and a stay having been included in said order to show cause providing that—

"And in the meantime and pending the hearing and determination of this motion and the entry of an order thereon, the United States attorney, any and all agents of the Department of Justice, any and all agents of the Treasury Department, the United States marshal for the southern district of New York and/or his deputies are hereby stayed from using the evidence sought to be suppressed herein for any purpose whatsoever as well as any information directly or indirectly gained therefrom"; and

Petitioners' said motion having been brought on by said order to show cause to be heard before me on February 10, 1931, the motion having been adjourned to that date, and said motion having been argued by David P. Siegel, Esq., attorney for the petitioners, and Robert E. Manley, the then acting United States attorney by Ulysses S. Grant, assistant United States attorney, of counsel, for the respondent United States attorney, and the affidavits of Ulysses S. Grant, sworn to January 31, 1931; Harry Morgenstern, sworn to January 28, 1931; J. Ray Olivera, sworn to January 29, 1931; Thomas Guilfoyle, sworn to January 24, 1931; Joseph M. Hago, sworn to January 24, 1931; and Laurence Delmore, sworn to January 28, 1931, and the papers and things seized in said room 604 and referred to in said affidavits, having been presented in opposition to said motion; and at the argument of said motion, the United States attorney, by Ulysses S. Grant, assistant United States attorney, of counsel, having moved upon said affidavits and papers, said order to show cause and all the proceedings heretofore had herein, that the said stay included in said order to show cause be modified pending the determination of said motion so as to permit, among other things, the use of the papers by Government officers in the course of investigations that they may make with a view of securing evidence of the guilt of persons other than the petitioners in committing the crime charged against the petitioners and/or other violations of the national prohibition act; and decision having been reserved on said motion made by petitioners and said motion made by the United States attorney herein for modification of said stay, and decision having been rendered and the opinion of the court having been filed, and the said acting United

States attorney having, since the argument of said motion, been succeeded in office by George Z. Medalie, the present United States attorney:

Now, upon said motion of the United States attorney, said order to show cause and affidavits and papers submitted in support of and in opposition to the petitioners' said motion and all the proceedings heretofore had herein; it is

On motion of George Z. Medalie, United States attorney for the southern district of New York;

Ordered, that said motion of the respondent for an order modifying said stay included as a part of said order to show cause signed by Judge Henry W. Goddard on January 21, 1931, to the extent hereinafter provided be and the same hereby is granted; and it is further

Ordered, that the said stay included as a part of said order to show cause be and the same hereby is modified to read:

That the United States attorney for the southern district of New York be, and he hereby is, stayed from using the papers and things seized by the Government officers in room 604 of the building 1547 Broadway, Borough of Manhattan, city and State of New York, at the time of the arrest of the petitioners in said room on January 12, 1931, as evidence in a trial of the petitioners or either of them, pending the entry of an order determining petitioners' said motion for the return of said seized papers and the suppression of their use as evidence and for a further period of ten (10) days after the entry of said order, and if an appeal be taken from said order within the said ten (10) day period pending the determination of the appeal; and it is further

Ordered, that the said stay included in said order to show cause except as herein modified, and in so far as it otherwise provides, be, and the same hereby is, vacated.

FRANCIS G. CAFFEY,
U. S. D. J.

In United States District Court

[Title omitted.]

Petition for Appeal

To the honorable judges of the United States District Court for the Southern District of New York:

And now come the petitioners, Daniel M. Lefkowitz and Pauline Paris, by David P. Siegel, their attorney, and complain that in the order and decision of Hon. Francis G. Caffey, United States district judge, made and entered herein on the 18th day of February, 1931, and also in the opinion of the said Judge Francis G. Caffey

dated the 13th day of February, 1931, in so far as it denied the application of the petitioners for the suppression of any and all evidence of whatever nature, obtained directly or indirectly by reason of a search of the premises, room No. 604 in No. 1547 Broadway, in the Borough of Manhattan, City, State and Southern District of New York, on the 12th day of January, 1931, and for the return of all books, papers, correspondence and other papers, records and things belonging to the said Daniel M. Lefkowitz, and for such other and further relief as to this court may seem just and proper. And also in so far as the said order vacated and modified a stay contained in an order to show cause heretofore issued herein, certain manifest errors have intervened to the great prejudice and damage of the said petitioners, and conceiving themselves aggrieved thereby, said petitioners do hereby

Appeal from the said order to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignments of error which are filed herewith and pray for the allowance of the appeal herein, and for such other and further orders and processes as may cause all and singular the records, papers, and proceedings in said cause to be sent to the United States judges for the Circuit Court of Appeals for the Second Circuit under and according to the laws of the United States in that behalf made and provided, so that the same may be inspected and said judges of the said Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct that error, what of right and according to law ought to be done, and also that an order be made herein that all other proceedings in this action may be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Second Circuit, and also that a citation may issue herein as provided by law and also that the said petitioners be given leave to file with the clerk of the United States District Court for the Southern District of New York within thirty days from the date hereof, additional and/or amended assignments of error, and that the same may be included in the transcript of record in addition to and/or in the place and stead of the assignments of error now presented by the said petitioners.

And your petitioners will ever pray.

Dated New York, February 27th, 1931.

DAVID P. SIEGEL,
Attorney for Petitioners,
Office & P. O. Address, No. 11 Broadway,
Borough of Manhattan, City of New York.

In United States District Court

[Title omitted.]

Order Allowing Appeal

Feb. 28, 1931

On reading the petition of Daniel M. Lefkowitz and Pauline Paris, the petitioners herein, for the allowance of an appeal from the order of Hon. Francis G. Caffey, United States district judge for the southern district of New York, entered herein on the 18th day of February, 1931, and the assignments of error presented on behalf of the said petitioners, it is hereby

Ordered, that an appeal be, and the same hereby is, allowed to the said Daniel M. Lefkowitz and Pauline Paris from the order of the United States District Court for the Southern District of New York, to the United States Circuit Court of Appeals for the Second Circuit, as prayed for in the petition for the allowance of an appeal, and it is hereby further

Ordered, that the said appeal shall operate as a supersedeas and that pending the final determination of the said appeal by the United States Circuit Court of Appeals for the Second Circuit, the United States attorney for the southern district of New York, be, and he hereby is, for the period herein stated, stayed from using all of the books, papers, correspondence, and other papers, records, and things seized by the Government officers in room 604 of the building #1547 Broadway, in the Borough of Manhattan, city, State, and southern district of New York, at the time of the arrest of the petitioners in the said room on the 19th day of January, 1931, as evidence in a trial of the petitioners or either of them, and it is hereby further

Ordered, that a transcript of all and singular the records, papers, and proceedings herein be duly authenticated and transmitted to the said United States Circuit Court of Appeals for the Second Circuit, and that a citation be issued as provided by law.

FRANCIS G. CAFFEY,
United States District Judge.

[Title omitted.]

In United States District Court

Assignments of Error

Now come the petitioners-appellants, Daniel M. Lefkowitz and Pauline Paris, by David P. Siegel, their attorney, and make and file their assignments of error, respectfully, showing that the court below erred in each of the following respects:

First: That the court erred in denying the application of the petitioner, Daniel M. Lefkowitz, for the suppression of any and all evidence of whatever nature obtained directly or indirectly by reason

of a search of the premises, room 604, at #1547 Broadway, in the Borough of Manhattan, city, State, and southern district of New York, on the 12th day of January, 1931.

Second. That the court erred in denying the application of the petitioner, Daniel M. Lefkowitz, for the return of all books, papers, correspondence, and other papers, records, and things belonging to the said petitioner and taken by the agents of the United States Department of Justice from the premises aforementioned at the time of the arrest of the petitioner.

Third. That the court erred in denying the application of the petitioner, Pauline Paris, for the suppression of the letter addressed to Assistant United States Attorney Grant, referred to in the affidavit of petitioner, Pauline Paris.

Fourth. That the court erred in denying the application of the petitioner Pauline Paris for the return of the letter addressed to the assistant United States attorney referred to in the affidavit of the petitioner, Pauline Paris.

Fifth. That the court erred in refusing to find that the search of the premises, room 604, at #1547 Broadway, in the Borough of Manhattan, city, State, and southern district of New York, and the seizure of the books, papers, correspondence, and other papers, records, and things belonging to the said petitioners was not in violation of the petitioners' rights under the fourth and fifth amendments to the Constitution of the United States.

Sixth. That the court erred in holding that the case of Go-Bart Importing Co. *v.* United States, 282 U. S. ——; 51 Sup. Ct. 153; 75 Lawyers Ed. 185, was not binding upon the court in the case at bar.

Seventh. That the court erred in holding that the case at bar was governed by the ruling of the United States Supreme Court in Marron *v.* United States, 275 U. S. 192.

Eighth. That the court erred in holding that the petitioners were properly and lawfully arrested by the deputy marshal pursuant to the authority vested in him and the duty imposed on him by a warrant of arrest.

Ninth. That the court erred in holding that the premises, room 604, #1547 Broadway, in the Borough of Manhattan, city, State, and southern district of New York, constituted a single room.

Tenth. That the court erred in holding that the offense charged in the complaint was actually in progress and was being participated in by both petitioners in room 604, #1547 Broadway, in the Borough of Manhattan, city, State, and southern district of New York, at the time of the arrest.

Eleventh. That the court erred in holding that the books, papers, correspondence, and all other papers, records, and things belonging to the petitioners herein were either contraband within Carroll *v.* United States, 267 U. S. 132, or were being employed as the usual and ordinary means of carrying on the criminal enterprise for which the arrest was made.

Twelfth. That the court erred in holding that each paper taken was, within the meaning of sections 33 and 34 of title 27 of the U. S. Code, property kept and used in the maintenance of a place where there was being maintained a violation constituting the nuisance denounced.

Thirteenth. That the court erred in holding that the premises, room 604, #1547 Broadway, in the Borough of Manhattan, City, State and Southern District of New York, could be a nuisance although there was never actually any liquor on the premises and that sections 33 and 34 of title 27 of the U. S. Code could be violated without the physical presence of intoxicating liquor in the premises.

Fourteenth. That the court erred in holding that the petitioners and their associates had gathered in the premises, room 604, #1547 Broadway, in the City, State and Southern District of New York, and were engaged in the conduct of the conspiracy or any act to effect its object at the time of their arrest.

Fifteenth. That the court erred in holding that the letter addressed to the assistant United States attorney referred to in the affidavit of the petitioner, Pauline Paris, was voluntarily typed by her.

Sixteenth. That the court erred in holding that it was immaterial that the agent of the Department of Justice who obtained the aforementioned letter typed by the petitioner, Pauline Paris, had an ulterior motive so long as no force was employed.

Seventeenth. That the court erred in holding that with respect to the aforementioned letter typed by the petitioner, Pauline Paris, that the case of Gouled *v.* United States, 255 U. S. 298, was inapplicable and that the case was governed by United States *v.* Maresca, 266 Fed. 713, 718, 719.

Eighteenth. That the court erred in holding that there was no occasion for making anybody except the United States attorney a respondent in the proceeding herein, and that there was no justification for continuing a stay against others named in the order to show cause.

Nineteenth. That the court erred in holding that the complaint and the warrant of arrest based thereon were regular and sufficient.

Wherefore the said petitioners-appellants, Daniel M. Lefkowitz and Pauline Paris, pray that the said order of the United States District Court for the Southern District of New York may be reversed and held for naught.

Dated, New York, February 27th, 1931.

DAVID P. SIEGEL,
Attorneys for Petitioners,
Office & P. O. Address, No. 11 Broadway,
Borough of Manhattan, City of New York.

[Citation in usual form omitted in printing.]

In United States Circuit Court of Appeals, for the Second Circuit

IN THE MATTER OF THE APPLICATION OF DANIEL M. LEFKOWITZ AND Pauline Paris for the suppression of any and all evidence of whatever nature, obtained directly or indirectly by reason of a search of premises room #604 in #1547 Broadway, in the Borough of Manhattan, City and State of New York, and for the return of all books, papers, correspondence and all other papers and records belonging to the said Daniel M. Lefkowitz, etc.

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, respondent

M 18/367

Stipulation and order waiving printing of exhibits

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the printing of all of the exhibits herein, consisting of the seized papers referred to the affidavit of Ulysses S. Grant (p. 17), and in the opinion of Caffey, D. J. (p. 84), be, and the same hereby is, waived, and that such exhibits may be submitted to the Circuit Court of Appeals for the Second Circuit upon the argument, either in their original form or in the form of photostatic copies, with like force and effect as though physically reproduced herein.

Dated, New York, April 27, 1931.

DAVID P. SIEGEL,
Attorney for Petitioners-Appellants.
GEORGE Z. MEDALIE,
United States Attorney.

So ordered this 27th day of April, 1931.

MANTON,
U. S. C. J.

In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said district court in the above-entitled matter as agreed on by the parties.

Dated, New York, April 27th, 1931.

DAVID P. SIEGEL,
Attorney for Petitioners-Appellants.
GEORGE Z. MEDALIE,
United States Attorney for the Southern District of New York,
Attorney for Respondent-Appellee.

[Clerk's certificate to foregoing transcript omitted in printing.]

In United States Circuit Court of Appeals for the Second Circuit

No. 432, October term, 1930

Argued June 2, 1931. Decided July 10, 1931

IN THE MATTER OF THE APPLICATION OF DANIEL M. LEFKOWITZ AND Pauline Paris, petitioners-appellants, for the suppression of any and all evidence of whatever nature, obtained directly or indirectly by reason of a search of premises Room No. 604 in No. 1547 Broadway, in the Borough of Manhattan, city and State of New York, and for the return of all books, papers, correspondence and all other papers and records belonging to the said Daniel M. Lefkowitz, et cetera

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, respondent-appellee

Appeal from the District Court of the United States for the Southern District of New York.

Before Manton, Swan, and Chase, circuit judges.

Appeal from an order of the District Court for the Southern District of New York denying an application of petitioners, who are now the appellants, for the suppression of evidence and the return of books and papers seized. Reversed in part.

David P. Siegel, of New York City (Milton B. Seasonwein, of New York City, of counsel), for appellants.

George Z. Medalie, U. S. atty., of New York City (Ulysses S. Grant, asst. U. S. atty., of New York City, of counsel), for appellee.

Opinion

CHASE, Circuit Judge: These two petitioners were arrested, together with one Williams, who was later released, in room 604, at No. 1547 Broadway, New York City, January 12, 1931, by a deputy United States marshal in execution of a John Doe Warrant. They were charged with maintaining a liquor nuisance and with conspiracy to violate the national prohibition act. Four special agents assisted in making the arrests, which are to be treated as having been made lawfully.

Room 604 was on the sixth floor of a building at the above address, and was about ten feet wide and twenty feet long. It was divided by a partition into a front office and a back office, and used ostensibly by a real estate agency. At the time the men were arrested Pauline Paris, who was employed as a typist in the office, was not present, but came in soon afterwards and was immediately placed under arrest. When they were arrested the men were searched. Various papers were taken from the person of Lefkowitz and delivered to the United States attorney, who now has possession of all of them except what

he has consented to return. A small bottle of whisky was taken from Williams.

Contemporaneously with the arrests, both rooms were thoroughly searched. Two desks were opened, ransacked, and papers they contained seized; a towel cabinet was searched and papers in it seized; waste paper baskets were emptied and scraps of paper taken from them and later pasted together. All that was seized after this search was delivered to the United States attorney, who now has possession of so much thereof as he has not seen fit to return.

After she was arrested Pauline Paris was told by one of the officers that he would try to procure her release on bail and thus make it unnecessary for her to remain in jail over night if she would write on her typewriter a letter he would dictate and place her signature upon it. She readily consented to do so, and the following letter was written.

ULYSSES GRANT,

Post Office Bldg., New York City.

MY DEAR MR. GRANT: Since everything has gone fine, I would suggest that this girl whose name is signed below be left out as soon as bail is arranged for her.

Very truly yours,

J. RAY OLIVER.

[S] PAULINE PARIS.

It was entirely in typewriting, except the name Pauline Paris, which was in her handwriting. The officer intended to, and did, facilitate her release on bail, but his primary purpose in having the letter written was to obtain a sample of her work on that typewriter and her signature.

One of the two desks searched was in each office into which the room had been divided. In the desk in the back office a small bottle partly filled with alcohol was found and seized. No other intoxicating liquor was discovered except that which Williams had. The search and seizure was made without a search warrant, and is claimed to have been lawful as an incident of the arrests.

Although this case differs from United States *v.* 1,013 Crates of Empty Old Smuggler Whiskey Bottles, etc., 50 F.(2d)——, just decided by this court, in that this comes up on appeal from the denial of an application for the suppression and return of evidence seized while the appeal in that case was from a decree on a libel for forfeiture of contraband, the right to search and seize as an incident of a lawful arrest is, here as there alone relied upon by the Government in justification.

As is so well shown in Boyd *v.* United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, the right to search for and seize contraband when it is done lawfully is utterly unlike a search for evidence merely and the seizure of one's private books and papers for the sole purpose of using them for purposes of incrimination. Without con-

fusing a search for and seizure of contraband of which the Government is entitled to take possession because of what in law is said to be the inherent guilt of the res itself and the search for and seizure of books, papers, documents with a like which are not, at least as yet, considered guilty themselves, but are only wanted to prove the guilt of persons or property, it is needless to emphasize that searches and seizures of both kinds must always be reasonable to be lawful. Whenever evidence is searched for and seized, it must be in connection with something else which gives to the public a paramount interest in it. Gouled *v.* United States, 255 U. S. 298, at page 309; 41 S. Ct. 261; 65 L. Ed. 647. This happens when it is done as an incident of a lawful arrest or a lawful seizure of contraband; but a search and seizure can not be reasonable, and therefore, justified, if it is based solely on the purpose to obtain nothing but information generally which may, perhaps, be proof that a crime has been committed. Evidence so obtained is not admissible against the person or persons whose rights have been violated. To admit it would be contrary to the fifth amendment in that part which reads "no person * * * shall be compelled in any criminal case to be a witness against himself." Boyd *v.* United States, supra; Gouled *v.* United States, supra. Consequently, when a seizure of contraband is defended as an incident of a lawful arrest, as in United States *v.* 1,013 Crates, etc., supra, or a seizure of evidence is defended on the same ground, as in this case, the reasonableness of the search which resulted in the seizure is the test of legality in each instance.

The application of this principle to the present case results at once in dividing the property seized into two classes—that which was taken from the person of petitioner Lefkowitz when he was arrested and searched; and that which was seized when the office and its furniture were explored for evidence.

The things that were found on Lefkowitz were lawfully seized and may be used against him. Agnello *v.* United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409; Marron *v.* United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231; United States *v.* Kirschenblatt (C. C. A.) 16 F.(2d) 202, 51 A. L. R. 416. The law on this subject has long been so well settled that it is useless to do more than state it whenever occasion arises. It is difficult to conceive how the facts in one case can make it differ from others in this respect, and such a search properly conducted is reasonable as a matter of law.

What was seized in the search of the offices falls within the second class, and the application of the governing legal principles to whatever such searches and seizures may be made may lead to different results as circumstances may differ. It comes right down to what may be reasonable in fact. There are, however, certain fixed boundaries which may not be transgressed. One of these, and the only one we need to mention now, is the firmly rooted proposition that

what are called general exploratory searches throughout premises and personal property are forbidden. It does not matter whether the premises are comparatively large or small, whether the articles of personal property opened and the contents examined are numerous or few, the right of personal security, liberty, and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. The legal principles which protect all men equally loom as large at one time as at another, and forbid the search and seizure. Such a search and seizure as these officers indulged themselves in is not like that in Marron *v.* United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made. The decision that does control is Go-Bart Importing Co. *v.* United States, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. ——. Indeed, this case differs in its essential facts from that one so slightly that what is said in that opinion in characterizing the search made will apply with equal force to this one, which must accordingly be held unreasonable.

The only other paper to be dealt with is the letter typed by Pauline Paris. She acted voluntarily and with the knowledge that it was to go to the assistant United States attorney to whom it was written. That the officers wanted it for an undisclosed purpose seems less than enough to require its suppression now. What Judge Hough said in United States *v.* Maresca et al. (D. C.), 266 F. 713, 718 (5), may have been limited somewhat by Gouled *v.* United States, supra, but we do not understand that one who willingly writes a letter to another is entitled to have it suppressed on motion simply because it may be used not only for what the writer intended, but for some other purpose not then foreseen. And this is so, even though an agent of the Government instigated the writing well knowing that it might be used in a way the writer did not suspect. If what was done may be said to be the equivalent of obtaining a confession by fraud or a promise of favor, a matter we do not now either suggest or consider, whatever rights this petitioner may have can all be amply protected by objection if the letter is ever offered in evidence. As the papers seized may be admissible in evidence against others, the petitioners are not entitled to their return now. See In re Dooley (C. C. A.), 48 F. (2d) 121. They are sufficiently protected for the present by having suppressed what was seized unlawfully as to them.

Except as to what was obtained in searching the person of Lefkowitz and as to the letter written by Pauline Paris, the order is reversed, with directions to enter an order in conformity with this opinion.

SWAN, Circuit Judge, dissenting with opinion.

In United States Circuit Court of Appeals for the Second Circuit

No. 432, October term, 1930

Argued June 2, 1931. Decided July 10, 1931

IN THE MATTER OF THE APPLICATION OF DANIEL M. LEFKOWITZ AND Pauline Paris, petitioners-appellants, for the suppression of any and all evidence of whatever nature, obtained directly or indirectly by reason of a search of premises room No. 604 in No. 1547 Broadway, in the Borough of Manhattan, City and State of New York, and for the return of all books, papers, correspondence, and all other papers and records belonging to the said Daniel M. Lefkowitz, et cetera

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, respondent-appellee

Appeal from the District Court of the United States for the Southern District of New York.

Before Manton, Swan, and Chase, circuit judges.

Dissenting opinion

SWAN, Circuit Judge (dissenting): It is settled law that an officer making a lawful arrest may lawfully search property and premises within the prisoner's immediate control, as well as the prisoner's person, in order to find and seize the things used to carry on the criminal enterprise. Agnello *v.* United States, 269 U. S. 20, 30, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409; Carroll *v.* United States, 267 U. S. 132, 158, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790; Marsh *v.* United States, 29 F. (2d) 172 (C. C. A. 2); Appell *v.* United States, 29 F.(2d) 279 (C. C. A. 5); United States *v.* Kirschenblatt, 16 F.(2d) 202, 203, 51 A. L. R. 416 (C. C. A. 2.). The case of Marron *v.* United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, applied the principle to include documents and papers used in connection with the crime of maintaining a nuisance in violation of the prohibition act (27 U. S. C. A.). See, also, United States *v.* Poller, 43 F.(2d) 911 (C. C. A. 2); Sayers *v.* United States, 2 F.(2d) 146 (C. C. A. 9); Browne *v.* United States, 290 F. 870 (C. C. A. 6); United States *v.* Durkin, 41 F. (2d) 851 (D. C. M. D. Pa.); United States *v.* Wilson, 163 F. 338 (C. C. S. D. N. Y.). The papers seized are listed in the record, and items 2, 3, 4, and 10 do not appear to have any relation to the crime with which Lefkowitz was charged. The other items, however, business cards, notebooks, lists of names, etc., apparently used in connection with the illegal conspiracy, were, I believe, validly seized.

The cases above cited would seem to justify the search and seizure made by the officers within the small rooms occupied by the prisoner when arrested in the case at bar. Nor do I read the opinion of the

Supreme Court in the recent Go-Bart Case, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. ——, as laying down a contrary rule. There the search was deemed unreasonable because of fraud and threats of force by means of which the officers gained access to the locked desks and safe. Here there was nothing of that sort. The cases involving searches of premises incidental to an arrest contain no intimation that the search may not be a thorough one for things concealed. But even if some of the papers were obtained by an unreasonably extensive and exploratory search for documents not open and visible, I think the court would be required to differentiate between the papers thus obtained and those which were within the principle of a reasonable search incidental to a lawful arrest. Because some papers were illegally seized, it does not follow that those lawfully taken must also be returned. In my opinion the order should be affirmed except as to the four items above mentioned as unrelated to the crime.

In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York, on the 17th day of July, one thousand nine hundred and thirty-one.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Harrie B. Chase, circuit judges.

DANIEL M. LEFKOWITZ, AND PAULINE PARIS, PETITIONERS-APPELLANTS,

v.

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, respondent-appellee

Judgment

Filed July 21, 1931

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said district court be, and it hereby is, reversed in part, with directions to the district court to enter an order in conformity with the opinion of this court.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

WM. PARKIN, *Clerk.*

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

Order allowing certiorari

Filed November 30, 1931

The petition herein for a writ of certiorari to the United Stat Circuit Court of Appeals for the Second Circuit is granted. An it is further ordered that the duly certified copy of the transcript the proceedings below which accompanied the petition shall b treated as though filed in response to such writ.

[Indorsement on cover:] Enter Attorney General. File N 36,280. U. S. Circuit Court of Appeals, Second Circuit. Term N 486. United States of America, petitioner, vs. Daniel M. Lefkowi and Pauline Paris. Petition for a writ of certiorari and exhib thereto. Filed October 16, 1931. File No. 36,280.

INDEX

	Page
Petition	1
Question presented	1
Statement	2
Specification of error to be urged	11
Reasons for granting the writ	12
Brief in support of petition:	
Opinions below	14
Jurisdiction	14
Question presented, statement, etc	14
Argument—	
I. The arrests were lawful	14
II. Since the arrests were lawful, search of the premises where they were made was lawful; and that search was not unreasonable	16
Conclusion	24
Appendix (Statute involved)	26

CITATIONS

Cases:	
Agnello v. *United States*, 269 U. S. 20	23
Ash v. *United States*, 299 Fed. 277	15
Brady v. *United States*, 300 Fed. 540, certiorari denied, 266 U. S. 620	15
Carroll v. *United States*, 267 U. S. 132	23
Go-Bart Co. v. *United States*, 282 U. S. 344	12, 17, 18–19, 24
Kurtz v. *Moffitt*, 115 U. S. 487	15
Lambert v. *United States*, 282 Fed. 413	15
Marron v. *United States*, 275 U. S. 192	12, 16, 18, 22
United States v. *Lee*, 274 U. S. 559	23
Statute:	
National Prohibition Act, c. 85, 41 Stat. 305, 313, 316—	
Sec. 19 (U. S. C., Title 27, Sec. 31)	15, 26
Sec. 29 (U. S. C., Title 27, Sec. 46)	26

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL M. LEFKOWITZ AND PAULINE PARK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above-entitled cause on July 21, 1931 (R. 113), reversing in part an order of the District Court for the Southern District of New York (R. 92), denying an application for the suppression of evidence and the return of seized books and papers.

QUESTION PRESENTED

Whether the respondents are entitled to the return of books and papers the search for and seizure

of which are alleged to have been illegal, and to the suppression of the evidence obtained by means of the search and seizure.

STATEMENT

This was an application by the respondents for an order directing the suppression of evidence and the return of books and papers seized on the premises at 1547 Broadway, Room 604, New York City, where the respondent Lefkowitz maintained an office and the respondent Paris was employed as a stenographer. In support of the application, the respondents filed affidavits alleging that they had been arrested on the premises in question by Federal officers; that the officers thereupon searched the premises, including the waste paper baskets and the drawers of desks, and took and carried away certain books, papers, and records, which articles were then in the possession of an Assistant United States Attorney who had refused a demand for their return; that at no time during the search and seizure did the officers exhibit any warrant of arrest or search warrant; and that the search and seizure were in violation of the deponents' rights under the Fourth and Fifth Amendments. (R. 5–16.)

Affidavits were filed in response. It appears from them and the exhibits that the circumstances leading to the arrests and search and seizure were

substantially as follows:[1] In July, 1930, Special Agent Hugo of the Bureau of Prohibition was assigned the duty of investigating a report that one Henry Miller, who gave his address as 1547 Broadway, Room 604, New York City, was soliciting orders for intoxicating liquors by mail. Hugo was given several letters addressed by the B. & O. Novelty Company and by Henry Miller to C. F. Odell, Davenport, Oklahoma, regarding a price list of liquor and requesting orders for liquor. One of these letters, with the letterhead "Henry Miller," had, at the bottom thereof, "formerly the B. & O. Novelty." (R. 50–51.)

Writing from Buffalo, New York, over the signature of "Anthony Craig," and representing that he had been referred to Miller by C. F. Odell, Hugo thereafter engaged in an extended correspondence with Miller at the business address above mentioned, in the course of which he received price lists of whiskies, brandies, and wines offered by Miller for sale and was advised that he should procure in advance a New York draft covering any order he should send. (R. 51–54.). On October 27, 1930, Hugo wrote Miller, enclosing a New York draft for $55 and ordering one case of Scotch whiskey to be sent immediately. Miller replied under date of October 28, 1930, thanking him for the check and

[1] The facts are stated at length in an effort to show that the procedure of the Prohibition Agents before the arrests was in all respects regular.

order and advising: "Merchandise leaves to-day." Hugo later obtained from the railway express agency at Buffalo two packages addressed to "Anthony Craig," and upon examining them found that they contained bottles of Scotch whiskey. (R. 54–55.)

Thereafter Hugo wrote Miller that he had not received the whiskey ordered by him. Miller replied that he was putting a tracer on the lost shipment and would advise as to the result within a few days. Hugo then prepared a letter addressed to Miller introducing one Jose Hernandez and advising that Hernandez had been authorized by him (Craig) to receive from Miller liquor to replace that alleged to have been lost. Posing as Hernandez, Hugo went to Room 604, 1547 Broadway, New York City, presented the letter to a young lady whom he found there and whom he later learned was Pauline Paris, and told her that he was a friend of Anthony Craig and had come to inquire about the delivery of a case of liquor for which Craig had paid but which he had not received. She informed him that Miller would probably be in the office the next day and suggested that he come back and take the matter up directly with Miller. (R. 56–57.)

Hugo later visited Room 604 on two occasions, being accompanied each time by Special Agent Olivera. He introduced Olivera to Pauline Paris as Manuel Negroni and told her that he desired

that the case of liquor which was to be delivered to him in place of the one lost in shipment should be delivered to Negroni. At her suggestion he left an address, in New York City, where the liquor could be sent, and she promised that it would be delivered at any time Negroni would specify. Hugo then remarked that Negroni would like to sell whiskey to his friends and asked whether it would not be possible for Miller to lower his prices so that Negroni could make a little profit. She replied that she would arrange a meeting between Miller and Negroni to discuss lower prices for the wholesale buying of liquor from Miller. She gave Hugo a slip of paper upon which she had written "Chickering 4-8928" and told him to call that telephone number on January 5, 1931, to arrange a meeting between Negroni and Miller. (R. 57–58.) On January 12, 1931, Hugo received in Buffalo a letter addressed to Anthony Craig upon a letterhead inscribed "William Salmon, 1547 Broadway, Room 604, New York City," announcing that, pursuant to his custom of changing his name every year, the writer had changed his name "to the above." The letter was signed "William Salmon, Formerly Henry Miller." (R. 58–59.)

At various times in January, 1931, before the 12th of that month, Agent Olivera, representing himself as Manuel Negroni, had conversations with Miller with reference to the shipment of liquor to Anthony Craig and future shipments of liquor to

him. He arranged with Miller for the shipment to him, as a representative of Craig, of liquor to take the place of the shipment to Craig alleged to have been lost. The liquor was thereafter shipped to an address in the Southern District of New York. Upon its delivery it was found by Agent Olivera, who tasted it, to be intoxicating liquor fit for use for beverage purposes. (R. 76–77.) As late as January 5, 1931, Olivera had seen on the outer door of Room 604 the sign "The Southern Agency, D. M. Lefkowit." (R. 77.)

On January 9, 1931, Olivera called Chickering 4–8928, the number of the telephone in Room 604, and talked to Pauline Paris, who told him that she could receive orders for liquor and asked whether the "stuff" that he had received was all right. Upon Olivera's asking for an appointment with Miller, she said that Miller was not in, but that he could talk to his partner. A man then came to the telephone who also asked whether the "stuff" Olivera had received was all right. In the conversation which followed it was arranged that Olivera should call at Room 604 at 3 o'clock p. m. on January 12, 1931, to see Miller with reference to further orders and deliveries of liquor. (R. 36–37.)

On January 12, 1931, Agent Olivera appeared before a United States Commissioner and swore to a complaint charging that commencing on or about June 21, 1930, "and continuing thereafter down to

the present time," Henry Miller, "Jane Doe," and others had conspired with each other and with divers other persons, to the deponent unknown, to sell, possess, transport, furnish, deliver, and take orders for intoxicating liquor containing more than one-half of 1 per cent of alcohol by volume and fit and intended for use for beverage purposes, without permits, contrary to the National Prohibition Act. The complaint alleged that it was a part of the conspiracy that the defendants should solicit through the United States mails and by other means, from an office in Room 604, at 1547 Broadway, New York City, where the defendants pretended to do a real estate business under the name "The Southern Agency—D. M. Lefkowit," orders for intoxicating liquor from divers persons throughout the United States, and should arrange to have intoxicating liquor sent and delivered by express companies, automobiles, and other carriers to the purchasers of said liquor, to collect money in payment of said liquor, and to share in the proceeds of the illegal scheme. (R. 71–73.) Among the overt acts alleged were the sending of letters by the defendant Miller to C. F. Odell; conversations had with the deponent by the defendants "Jane Doe" and Henry Miller, and the transportation by the defendants of one case of Scotch whiskey on or about January 7, 1931, within the Southern District of New York. (R. 73–74.)

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As the source of the information upon which the complaint was based, Olivera averred that he had read letters sent by the B. & O. Novelty Company and by Henry Miller soliciting orders for intoxicating liquor from C. F. Odell, which letters were then in the possession of the deponent and copies thereof annexed to the complaint; that he had read the official reports of, and had talked personally with, Special Agent J. M. Hugo with reference to correspondence had between Hugo, using the name Anthony Craig, and the defendant Henry Miller regarding a shipment of liquor made by Miller to Craig on or about October 28, 1930; that he had examined the photostatic copy of a bank draft sent in payment for such liquor and that the name "Henry Miller" appeared as one of the endorsers of that draft; that the deponent, using the name Manuel Negroni, had had conversations with the defendants Henry Miller and "Jane Doe" regarding the shipment by Miller to Craig and proposed shipments of liquor by Miller to the deponent; and that the deponent had examined the contents of a shipment delivered within the Southern District of New York pursuant to an arrangement made by the deponent with the defendants Henry Miller and "Jane Doe," and had found such shipment to contain intoxicating liquor fit for use for beverage purposes. (R. 75–77.)

Upon the filing of the complaint the United States Commissioner issued a warrant for the ar-

rest of the defendants named therein. (R. 82.) The warrant and a certified copy of the complaint were delivered to Deputy United States Marshal Morgenstern, who proceeded with them in his possession to 1547 Broadway, accompanied by Special Prohibition Agents Olivera, Delmore, Guilfoyle, and Gaughan, who were to identify the persons designated in the complaint and warrant and to assist in making the arrests. (R. 31–32.) Olivera entered Room 604 in advance of the other officers, ostensibly to keep the appointment he had with Miller for that afternoon. Upon seeing him, Miller said, "Come on in," and was leading him into the inner office when the other Federal officers entered. Olivera pointed out Miller to the deputy marshal, saying: "That is Henry Miller." Morgenstern then informed Miller that he had a warrant for his arrest and placed him under arrest. At the time of his arrest Miller gave his true name as Daniel Lefkowitz. Following the arrest, Special Agent Delmore searched the person of Lefkowitz and took therefrom and turned over to Morgenstern the papers and articles mentioned in the affidavit made by Delmore. (R. 32–33, 37–38, 39, 45, 64–65.)

After the arrest of Lefkowitz the Special Agents conducted a search of Room 604, which is about 10 feet wide and 20 feet long and is divided by a partition into an outer and inner office. (R. 38, 45.)

They found in a desk in the outer office the notebooks and papers described in the affidavit of Agent Guilfoyle (R. 46–47); in a desk in the inner office, and in the waste paper baskets, the articles mentioned in the affidavit of Agent Delmore (R. 67–68); and in a towel cabinet, several typewritten sheets containing the names and addresses of numerous persons throughout the United States. (R. 49.) These articles were seized by the Agents and eventually turned over to Assistant United States Attorney Grant. (R. 19–20.)

While the search of Room 604 was in progress a young lady entered and was pointed out by Agent Olivera as the "Jane Doe" referred to in the complaint and warrant of arrest. She was placed under arrest by Deputy Marshal Morgenstern, to whom she gave her name as Pauline Paris. (R. 33, 38, 47.) At the suggestion of Agent Olivera, she voluntarily typed, and wrote her signature on, the following letter (R. 48):

> ULYSSES GRANT,
> *Post Office Bldg., New York City.*
>
> MY DEAR MR. GRANT: Since everything has gone fine, I would suggest that this girl whose name is signed below be left out as soon as bail is arranged for her.
>
> Very truly yours,
>
> J. RAY OLIVER.
>
> (S.) PAULINE PARIS.

As stated in the affidavit of Agent Olivera, this letter was procured by him partly with the bona fide intention of facilitating her release on bail and partly to obtain her signature and a sample of her typewriting when using the machine which was in Room 604. (R. 40, 47–48.) Olivera later arranged to have the United States Commissioner remain in his office until the prisoners were brought before him, and they were arraigned and released on bail that evening. (R. 41.) No force was used by the officers in conducting the search, nor were the desks or the cabinet broken into, as none was locked. (R. 49, 69.)

Following a hearing, the application to suppress, etc., was denied by the District Court (R. 92), which rendered a written opinion (R. 84). Upon appeal, the order of the District Court was reversed by the Circuit Court of Appeals as to all the property seized, except that taken from the person of the respondent Lefkowitz and the letter written by the respondent Paris, on the ground that the search and seizure were unreasonable. (R. 114.) Circuit Judge Swan, dissenting, expressed the view that the seizure was lawful except as to certain items which appeared to have no relation to the crime with which Lefkowitz was charged. (R. 118.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the search of the premises and the seizure of the books and papers were unreasonable.

REASONS FOR GRANTING THE WRIT

Both courts below regarded the disposition of this case as dependent upon the proper effect to be given the decision of this Court in *Go-Bart Co.* v. *United States,* 282 U. S. 344, holding the search there involved unreasonable. The District Court thought that that decision should be confined to the particular facts which this Court then had under consideration. The Circuit Court of Appeals, however, treated the search in this case as a general, exploratory search for evidence within the condemnation of the *Go-Bart case.* The Government believes that the District Court was correct, and that the decision of the Circuit Court of Appeals not only erroneously interprets the *Go-Bart case,* but is in substantial conflict with the decision of this Court in *Marron* v. *United States,* 275 U. S. 192.

The opposing constructions placed by the courts below upon the *Go-Bart* decision reflect the widespread uncertainty which prevails among Federal enforcement officers and the lower Federal courts as to the true scope and effect of that decision. It seems to be generally agreed that the officer making a lawful arrest still has the right to conduct a contemporaneous search of the premises under the immediate control of the person arrested in order to find and seize the things used in committing the offense for which the arrest was made; that the fact that articles coming within that description are books or papers, evidentiary in character,

is no bar to their seizure; and that, having the right to search, the officer not only has the right but is in duty bound to make a thorough search. But at what point he must stop in his search and refrain from taking articles used in committing the offense is left in doubt by the *Go-Bart case*. It is therefore of the utmost importance that this Court determine whether the search conducted in the case at bar was lawful, in order that the law may be clarified and so that arresting officers may be properly instructed as to what is a reasonable search incident to a lawful arrest to the end that the constitutional rights of those arrested may be strictly observed without unduly hampering the effective enforcement of the law.

Wherefore it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals in the above-entitled cause should be granted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1931.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 84) is reported in 47 F. (2d) 921. That of the Circuit Court of Appeals (R. 114) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 21, 1931. (R. 119.) The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATEMENT, ETC.

The question presented, statement of the case, and the specification of error relied upon are set out in the petition.

ARGUMENT

I

THE ARRESTS WERE LAWFUL

The District Court held that the arrests were lawful (R. 84), and the Circuit Court of Appeals said that they were "to be treated as having been made lawfully" (R. 114). For the following reasons the Government submits that the arrests were lawful:

1. The arrests were made by a Deputy United States Marshal upon a warrant of arrest issued by

a United States Commissioner and addressed to the United States Marshal or to any of his deputies. (R. 33, 82.) The complaint upon which the warrant issued adequately charged a conspiracy to violate the National Prohibition Act (R. 71–75), and was supported by a statement under oath by Special Agent Olivera of facts within his knowledge which were ample to show probable cause for belief that the accused had committed the offense charged (R. 75–78). Before the arrests, the respondents Lefkowitz and Paris were identified by Olivera as the Henry Miller and "Jane Doe" named in the complaint and warrant of arrest. (R. 32–33.)

2. The previous dealings between Agent Olivera and the accused afforded reasonable ground for belief that the persons arrested had committed the felony of conspiring to violate the National Prohibition Act. *Kurtz* v. *Moffitt*, 115 U. S. 487, 504; *Brady* v. *United States*, 300 Fed. 540, 543 (C. C. A. 6th), certiorari denied, 266 U. S. 620.

3. Olivera's prior transactions with the accused in Room 604, including the appointment to discuss the sale of liquor with Lefkowitz at about the time of the arrests, constituted ample ground for belief that the conspiracy was still on foot when he entered that room and found Lefkowitz there apparently ready to accept orders for the delivery of liquor in violation of Section 19 of Title II of the National Prohibition Act, 41 Stat. 313 (U. S. C., Title 27, Sec. 31), *infra*, p. 26. *Lambert* v. *United States*, 282 Fed. 413, 417 (C. C. A. 9th); *Ash* v. *United States*, 299 Fed. 277, 279 (C. C. A. 4th).

II

SINCE THE ARRESTS WERE LAWFUL, SEARCH OF THE PREMISES WHERE THEY WERE MADE WAS LAWFUL; AND THAT SEARCH WAS NOT UNREASONABLE

It is well settled that, upon making a lawful arrest, the arresting officer has the right without a search warrant contemporaneously to search the place where the arrest is made in order to find and seize things connected with the crime as the means by which it was committed. In *Marron* v. *United States*, 275 U. S. 192, 198–199, this Court said:

> The officers * * * lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. *Agnello* v. *United States, supra*, 30 [269 U. S. 20, 30]; *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States, supra*, 392 [232 U. S. 383, 392]. * * * The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose.

In the *Marron case* the premises searched consisted of an entire second floor, including six or seven rooms. The officers took a ledger which they found in a closet. This Court held the seizure proper as incident to Birdsall's arrest, on the ground that the ledger was in his immediate possession and control. The Court also upheld the taking

of papers lying beside a cash register.[1] Here the premises searched consisted of a business office room about ten feet by twenty feet, divided by a partition. The books and papers seized were taken from unlocked desk drawers, an unlocked towel cabinet, and waste paper baskets.

In *Go-Bart Co.* v. *United States,* 282 U. S. 344, however, this Court pointed out that a search incidental to a lawful arrest may be invalid because unreasonable within the prohibition of the Fourth Amendment; and both courts below treated this case as dependent upon the proper construction of that decision. The District Court said (R. 87):

> Much stress was laid in argument on the *Go-Bart* case. Each side claimed to benefit by it. I think, however, that what was there said is to be confined to the facts then under consideration and that it has no pertinency to the facts in the case at bar. I feel strongly that it was not the intention of the Supreme Court to depart from well-settled principles, theretofore announced by it in a long line of decisions.

The majority opinion of the Circuit Court of Appeals reads (R. 117):

---

[1] It is true that the officers in the *Marron case* were executing a valid search warrant for intoxicating liquor and articles for the manufacture of liquor; but, as this Court expressly held, the search warrant did not justify seizure of the ledger and papers which were not described in it. Thus the right to search for and seize such papers was held in that case to be incident to the arrest.

> * * * what are called general exploratory searches throughout premises and personal property are forbidden. It does not matter whether the premises are comparatively large or small, whether the articles of personal property opened and the contents examined are numerous or few, the right of personal security, liberty and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. * * * Such a search and seizure as these officers indulged themselves in is not like that in *Marron* v. *United States,* 275 U. S. 192, where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made. The decision that does control is *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344. Indeed, this case differs in its essential facts from that one so slightly that what is said in that opinion characterizing the search made will apply with equal force to this one, which must accordingly be held unreasonable.

In his dissenting opinion, Circuit Judge Swan, after citing *Marron* v. *United States, supra,* and other cases, said (R. 118):

> The cases above cited would seem to justify the search and seizure made by the officers within the small rooms occupied by the prisoner when arrested in the case at bar. Nor

> do I read the opinion of the Supreme Court in the recent *Go-Bart case*, 282 U. S. 344, as laying down a contrary rule. There the search was deemed unreasonable because of fraud and threats of force by means of which the officers gained access to the locked desks and safe. Here there was nothing of that sort.

In the *Go-Bart case*, prohibition officers possessing a warrant for the arrest of Gowen and Bartels arrested them for the felony of conspiring to violate the National Prohibition Act, made a thorough search of the premises where they were doing business, and seized papers and documents. Proceedings were brought to secure the return of the seized articles and for the suppression of their use as evidence. The Government conceded that the warrant was invalid, but contended that the arrests for felony were lawful without a warrant, and that the officers had the right, incident to the arrest, to search the premises for the means used to commit the crime.

This Court expressly assumed that the arrests were lawful. It held, however, that the search was invalid because unreasonable within the meaning of the Fourth Amendment, saying (pp. 357–358):

> There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the

officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. In April, 1929, Braidwood reported to Calhoun the existence of a conspiracy and that in pursuance of it sales and deliveries of intoxicating liquor had been made in 1927 and 1928. The record does not show any criminal overt act in 1929. Calhoun's description to O'Brien of the company's office in detail and of Gowen and Bartels shows that he knew the place and offenders. Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306.

Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the

arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place.

The Court here lays down the rule that in the determination of the reasonableness of a search each case is to be decided on its own facts. We submit that on its facts the instant case is plainly distinguishable from the *Go-Bart case*. In view of Olivera's previous dealings with the respondent Lefkowitz in Room 604 where the arrests were made, and of his appointment to meet him there on the afternoon of the search to discuss the sale of liquor, and of the fact that Lefkowitz showed by his greeting that he was expecting Olivera, it could not be doubted that when Olivera and the other officers arrived Lefkowitz was then engaged in carrying on the illegal business which was the object of the conspiracy. Unlike the *Go-Bart case*, where no overt act was alleged to have been committed by any conspirator within six months of the arrest and search, the record in the instant case shows the felonious conspiracy was still on foot. Only three days before the search Agent Olivera had a telephone conversattion with the conspirator Pauline Paris, in which she declared that she was authorized to take orders for liquor and inquired whether the liquor previously sent by Lefkowitz to

Olivera was good. She then said he could talk to "Miller's" partner and make an appointment with "Miller." The appointment for the day of the arrest was then made. Here, also, the officers procured a valid warrant of arrest, made no claim that they had a search warrant, and used no threats or show of force to compel the opening of locks. True, the search was thorough and included the desks, waste-paper baskets, and a towel cabinet. But, having the right to search for the means used in the commission of the offense for which Lefkowitz was arrested, the officers would have been derelict in their duty if they had omitted to examine every part of the premises where there was any likelihood that such articles might be found.

The fact that the search was not for definite and specific articles but for whatever was used as a means of committing the offense did not, we submit, render the search objectionable as a general, exploratory search for evidence. In the *Marron case, supra,* the officers were not aware of the existence of the ledger until they found it, and then did not know that it was a means of committing the offense for which the arrest had been made until they had opened it and examined its contents. That it was not a specific article for which they were searching was not regarded by this Court as barring their right to seize it.

The court below failed to recognize the distinction between a search authorized by a search warrant and a search authorized by a lawful arrest.

As pointed out by this Court in the *Marron case, supra,* nothing can be searched for or seized under a search warrant except that which is specifically described in it, whereas upon a lawful arrest the arresting officers have the right to search for and seize any article used in the commission of the offense for which the arrest was made. See also *Carroll* v. *United States,* 267 U. S. 132, 158; *Agnello* v. *United States,* 269 U. S. 20, 30; *United States* v. *Lee,* 274 U. S. 559, 563. A search of the latter sort is necessarily general in the sense that it is for things the existence of which can not be known until they are found; and if the things found and taken in the course of such a "general" search come within the description of articles which may in such case lawfully be searched for and seized, the fact that they furnish documentary proof of guilt does not, we submit, render the search unreasonable. In the *Carroll case, supra,* at page 158, it was expressly held that such things "may be seized and held as evidence in the prosecution," and this was the effect of the other decisions in which such searches have been upheld.

Judge Swan, in his dissenting opinion in the court below, held that Items 2, 3, 4, and 10 (R. 46, 47) "do not appear to have any relation to the crime with which Lefkowitz was charged." He considered the other items (R. 46, 47, 49, 67, 68), which were apparently used in connection with the illegal conspiracy, to have been validly seized. The

Government does not contend that items which appeared to have no relation to the crime should not be returned. It does contend, however, that most of the items here seized were "things used to carry on the criminal enterprise" within the rule stated in the *Marron case*, *supra*, at page 199, and that the court below erred in directing that these items be returned to the petitioners.

We submit that the search in this case comes within the rule held to govern in the *Marron case*, and is lacking in those factors the sum of which was regarded in the *Go-Bart case* as rendering unreasonable the search there involved. Under the construction of the latter decision by the court below, practically nothing is left of the rule that a search may be made as incident to a lawful arrest.

CONCLUSION

The decision of the Circuit Court of Appeals in this case is substantially in conflict with the decision of this Court in *Marron* v. *United States*, 275 U. S. 192, and erroneously construes the decision of this Court in *Go-Bart Co.* v. *United States*, 282 U. S. 344. A clarification of the latter decision is of the utmost importance to enable the proper instruction of arresting officers as to what is a reasonable search incident to a lawful arrest so that the constitutional rights of those arrested may be strictly observed without unduly hampering the

effective enforcement of the law. The petition for certiorari should therefore be granted.

Respectfully submitted.

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OCTOBER, 1931.

APPENDIX

STATUTE INVOLVED

Section 19 of Title II of the National Prohibition Act, c. 85, 41 Stat. 305, 313 (U. S. C., Title 27, Sec. 31), provides:

> No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this chapter.

Section 29 of Title II of the National Prohibition Act, c. 85, 41 Stat. 305, 316 (U. S. C., Title 27, Sec. 46), provides in part:

> Any person * * * who * * * violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than 90 days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years.

U. S. GOVERNMENT PRINTING OFFICE: 1931

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 466

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL M. LEFKOWITZ AND PAULINE PARIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

On page 15 of the brief in opposition respondent quotes a statement from the Government's petition for certiorari to the effect that the court below failed to recognize the distinction between a search under a search warrant and a search incident to a lawful arrest and states that there is no such distinction. *United States* v. *Kirschenblatt*, 16 F. (2d) 202 (C. C. A. 2d), is relied on and supports the contention. But in *United States* v. *Poller*, 43 F. (2d) 911, 913, and *United States* v. *Gowen*, 40 F. (2d) 593, 598, the Circuit Court of Appeals for the Second Circuit, which court decided the instant

case, held that the *Kirschenblatt* case was overruled by this Court in *Marron* v. *United States*, 275 U. S. 192. The *Gowen* case was reversed by this Court in [illegible] but the Court did not define the limits of reasonable searches made at the time of arrest, nor did it adopt any such rule as that announced in the *Kirschenblatt case*.

For the reasons stated in our brief review is sought because of the doubt which arises as to whether the instant case falls with the *Marron case* into the category of reasonable searches or with the *Go-Bart case* into the category of unreasonable searches. The decisions of the Second Circuit seem to emphasize this doubt.

Respectfully submitted.

[illegible],
Solicitor General.

WILBUR H. FRIEDMAN,
Attorney.

NOVEMBER, 1931.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of error to be urged	12
Summary of argument	12
Argument:	
I. The arrests were lawful	16
II. Since the arrests were lawful, search of the premises where they were made was lawful; and the search made was not unreasonable	18
Conclusion	43
Appendix A	45
Appendix B	47

CITATIONS

Cases:

Adams v. *New York*, 192 U. S. 585 ..... 18, 20
Agnello v. *United States*, 269 U. S. 20 ..... 26, 29
Argetakis v. *State*, 24 Ariz. 599 ..... 20, 40
Ash v. *United States*, 299 Fed. 277 18
Banks v. *Farwell*, 21 Pick. (Mass.) 156 ..... 18, 38, 39
Boyd v. *United States*, 116 U. S. 616 ..... 18, 19, 20, 22, 36
Brady v. *United States*, 300 Fed. 540, certiorari denied, 266 U. S. 620 17
Carmichael v. *McCowen*, Newfoundland 597 ..... 19, 25, 40
Carroll v. *United States*, 267 U. S. 132 ..... 17, 25, 29, 35
Closson v. *Morrison*, 47 N. H. 482 18
Commonwealth v. *Grasse*, 80 Pa. Super. Ct. 480 21
Commonwealth v. *Phillips*, 224 Ky. 117 ..... 21, 40
Commonwealth v. *Stubler*, 84 Pa. Super. Ct. 32 ..... 39, 40
Dillon v. *O'Brien and Davis*, 16 Cox. C. C. 245 ..... 13, 18, 21, 22, 24, 25, 32, 37, 38, 39, 40
Entick v. *Carrington*, 19 How. St. Tr. 1029 ..... 15, 19, 22, 36, 38
Getchell v. *Page*, 103 Me. 387 ..... 19, 39

Cases—Continued.

	Page
Go-Bart Co. v. *United States*, 282 U. S. 344	14, 29, 30–31, 32, 33, 34, 35, 42
Hails v. *Gardner*, 82 Fla. 355	20
Hale v. *Henkel*, 201 U. S. 43	20
Houghton v. *Bachman*, 47 Barb. (N. Y.) 388	18
Jenkins v. *State*, 4 Ga. App. 859	20
Kneeland v. *Connolly*, 70 Ga. 424	19
Lambert v. *United States*, 282 Fed. 413	18
Marron v. *United States*, 275 U. S. 192	13, 16, 18, 27, 29, 31, 32, 33, 34, 36, 38, 40, 41, 42
Newman v. *People*, 23 Colo. 300	19
North v. *People*, 139 Ill. 81	19, 38
O'Connor v. *Bucklin*, 59 N. H. 589	18
People v. *Cona*, 180 Mich. 641	21
People v. *Defore*, 242 N. Y. 13	20
Pickett v. *Marcucci's Liquors*, 112 Conn. 169	20, 40
Santo v. *State*, 2 Iowa 165	38
Smith v. *Jerome*, 47 Misc. (N. Y.) 22	21, 39, 40
Smith v. *State*, 299 Pac. (Okla.) 243	21
Spalding v. *Preston*, 21 Vt. 9	18
State v. *Evans*, 145 Wash. 4	21
State v. *Gorman*, 196 Iowa 237	21
State v. *Laundy*, 103 Oreg. 443	21
State v. *Magnano*, 97 Conn. 543	39
State v. *Mausert*, 88 N. J. L. 286	21
State v. *Mullen*, 63 Mont. 50	21
State v. *Myers*, 36 Idaho 396	21
State v. *Rebasti*, 306 Mo. 336	21
State v. *Reynolds*, 101 Conn. 224	18, 20
State v. *Robbins*, 124 Ind. 308	19, 39
State v. *Rudy*, 98 W. Va. 444	21
Thatcher v. *Weeks*, 79 Me. 547	18
United States v. *Lee*, 274 U. S. 559	27
Weeks v. *United States*, 232 U. S. 283	20, 22, 25, 29, 36, 37
West v. *State*, 110 Tex. Cr. App. 290	21
Wiggin v. *State*, 28 Wyo. 480	21
Wilson v. *United States*, 221 U. S. 361	20

Statutes:

National Prohibition Act, c. 85, Title II, 41 Stat. 305, 313, 316—	
Sec. 19 (U. S. C., Title 27, Sec. 31)	2
Sec. 29 (U. S. C., Title 27, Sec. 46)	2

Miscellaneous:

Bishop, Criminal Procedure, 1st ed. (1866), Sec. 668	19
Bishop, New Crim. Procedure, 2d ed. (1913), Sec. 211	21
Madison, Debates in the Federal Convention	49, 50

Miscellaneous—Continued.

	Page
1 Gales, Annals of Congress	50, 51, 52
3 Thorpe, American Charters, pp. 1868, 1891	47, 48
4 Thorpe, American Charters, p. 2456	49
5 Thorpe, American Charters, pp. 2783, 3063	48
6 Thorpe, American Charters, p. 3741	48
7 Thorpe, American Charters, p. 3814	47
Wigmore, Evidence (2d ed.), Secs. 2183, 2184, 2250, 2264	18, 20, 36
Wharton, Criminal Procedure, 10th ed. (1918), Sec. 97	21

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 43) is reported in 47 F. (2d) 921. That of the Circuit Court of Appeals (R. 56) is reported in 52 F. (2d) 52.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 21, 1931. (R. 61.) The petition for certiorari was filed October 16, 1931, and was granted November 30, 1931. (R. 62.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the respondents are entitled to the return of books and papers the search for and seizure of which are alleged to have been illegal, and to the suppression of the evidence obtained by means of the search and seizure.

STATUTES INVOLVED

Section 19 of Title II of the National Prohibition Act, c. 85, 41 Stat. 305, 313 (U. S. C., Title 27, Sec. 31), provides:

> No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this Act.

Section 29 of Title II of the National Prohibition Act, c. 85, 41 Stat. 305, 316 (U. S. C., Title 27, Sec. 46), provides in part:

> Any person * * * who * * * violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years.

STATEMENT

This was an application by the respondents for an order directing the suppression of evidence and

the return of books and papers seized on the premises at 1547 Broadway, Room 604, New York City, where the respondent Lefkowitz maintained an office and the respondent Paris was employed as a stenographer. In support of the application the respondents filed affidavits alleging that they had been arrested on the premises in question by Federal officers; that the officers thereupon searched the premises, including the waste-paper baskets and the drawers of desks, and took and carried away certain books, papers, and records, which articles were then in the possession of an Assistant United States Attorney, who had refused a demand for their return; that at no time during the search and seizure did the officers exhibit any warrant of arrest or search warrant; and that the search and seizure were in violation of the deponents' rights under the Fourth and Fifth Amendments. (R. 2–8.)

Affidavits were filed in response. It appears from them and the exhibits that the circumstances leading to the arrests and search and seizure were substantially as follows:[1] In July, 1930, Special Agent Hugo, of the Bureau of Prohibition, was assigned to investigate a report that one Henry Miller, 1547 Broadway, Room 604, New York City, was soliciting orders for intoxicating liquors by mail. Hugo was given several letters addressed by the B. & O. Novelty Company and by Henry Miller to

[1] The facts are stated at length for the purpose of showing that the procedure of the Prohibition Agents before the arrests was in all respects regular.

C. F. Odell, Davenport, Oklahoma, regarding a price list of liquor and requesting orders for liquor. On the bottom of one of these letters, with the letterhead "Henry Miller," was "formerly the B. & O. Novelty." (R. 26.)

Writing from Buffalo, New York, over the signature "Anthony Craig," and representing that he had been referred to Miller by C. F. Odell, Hugo engaged in an extended correspondence with Miller at the business address above mentioned, in the course of which he received price lists of whiskies, brandies, and wines offered by Miller for sale and was advised that he should procure in advance a New York draft covering any order he should send. (R. 26–27.) On October 27, 1930, Hugo wrote Miller, inclosing a New York draft for $55 and ordering one case of Scotch whiskey to be sent immediately. Miller replied under date of October 28, 1930, thanking him for the check and order and advising: "Merchandise leaves to-day." Hugo later obtained from the railway express agency at Buffalo two packages addressed to "Anthony Craig," which contained bottles of Scotch whiskey. (R. 28.)

Hugo then wrote Miller that he had not received the ordered whiskey. Miller replied that he was putting a tracer on the lost shipment and would advise as to the result within a few days. Hugo prepared a letter addressed to Miller introducing one Jose Hernandez and advising that Hernandez

had been authorized by him (Craig) to receive from Miller liquor to replace that alleged to have been lost. Posing as Hernandez, Hugo went to Room 604, 1547 Broadway, New York City, presented the letter to a young lady whom he found there and who he later learned was Pauline Paris, and told her that he was a friend of Anthony Craig and had come to inquire about the delivery of a case of liquor which Craig had paid for but had not received. She informed him that Miller would probably be in the office the next day and suggested that he come back and take the matter up directly with Miller. (R. 28–29.)

Hugo, accompanied by Special Agent Olivera, made two subsequent visits to the premises. He introduced Olivera to Pauline Paris as Manuel Negroni and told her that he desired the case of liquor which was to be delivered to him in place of the one lost in shipment, to be delivered to Negroni. At her suggestion he left an address, in New York City, where the liquor could be sent, and she promised that it would be delivered at any time Negroni would specify. Hugo then remarked that Negroni would like to sell whiskey to his friends and asked whether it would not be possible for Miller to lower his prices so that Negroni could make some profit. She replied that she would arrange a meeting between Miller and Negroni to discuss lower prices for wholesale buying of liquor. She gave Hugo a slip of paper upon

which she had written "Chickering 4-8928" and told him to call that telephone number on January 5, 1931, to arrange a meeting between Negroni and Miller. (R. 29-30.) On January 12, 1931, Hugo received in Buffalo a letter, addressed to Anthony Craig, under letterhead "William Salmon, 1547 Broadway, Room 604, New York City," announcing that, pursuant to his custom of changing his name every year, the writer had changed his name "to the above." The letter was signed "William Salmon, Formerly Henry Miller." (R. 30.)

At various times in January, 1931, before the 12th, Agent Olivera, representing himself as Manuel Negroni, had conversations with Miller with reference to the shipment of liquor to Anthony Craig and future shipments of liquor to him. He arranged with Miller for the shipment to him, as Craig's representative, of liquor to take the place of the lost shipment. The liquor was shipped to an address in the Southern District of New York, and was found by Agent Olivera, who tasted it, to be intoxicating liquor fit for use for beverage purposes. (R. 40.) As late as January 5, 1931, Olivera had seen on the outer door of Room 604 the sign "The Southern Agency, D. M. Lefkowit." (R. 40.)

On January 9, 1931, Olivera called Chickering 4-8928, the number of the telephone in Room 604, and talked to Pauline Paris, who told him that she could receive orders for liquor and asked whether

the "stuff" that he had received was all right. Olivera asked for an appointment with Miller. She said that Miller was not in, but that he could talk to his partner. A man then came to the telephone who also asked whether the "stuff" Olivera had received was all right. In the conversation which followed it was arranged that Olivera should call at Room 604 at 3 o'clock p. m. on January 12, 1931, to see Miller with reference to further orders and delfveries of liquor. (R. 19.)

On January 12, 1931, Agent Olivera appeared before a United States Commissioner and swore to a complaint charging that, commencing on or about June 21, 1930, "and continuing thereafter down to the present time," Henry Miller, "Jane Doe," and others had conspired with each other and with divers other persons, to the deponent unknown, to sell, possess, transport, furnish, deliver, and take orders for intoxicating liquor containing more than one-half of 1 per cent of alcohol by volume and fit and intended for use for beverage purposes, without permits, contrary to the National Prohibition Act. The complaint alleged that it was a part of the conspiracy that the defendants should solicit through the United States mails and by other means, from an office in Room 604, at 1547 Broadway, New York City, where the defendants pretended to do a real-estate business under the name "The Southern Agency—D. M. Lefkowit," orders for intoxicating liquor from divers persons

throughout the United States, and should arrange to have intoxicating liquor sent and delivered by express companies, automobiles, and other carriers to the purchasers of the liquor, to collect money in payment of the liquor, and to share in the proceeds of the illegal scheme. (R. 37–38.) Among the overt acts alleged were the sending of letters by the defendant Miller to C. F. Odell; conversations had with the deponent by the defendants "Jane Doe" and Henry Miller; and the transportation by the defendants of one case of Scotch whiskey on or about January 7, 1931, within the Southern District of New York. (R. 38–39.)

As the source of the information upon which the complaint was based, Olivera averred that he had read letters sent by the B. & O. Novelty Company and by Henry Miller soliciting orders for intoxicating liquor from C. F. Odell, which letters were then in the possession of the deponent and copies thereof annexed to the complaint; that he had read the official reports of, and had talked personally with, Special Agent J. M. Hugo with reference to the correspondence between Hugo, using the name Anthony Craig, and the defendant Henry Miller regarding a shipment of liquor made by Miller to Craig on or about October 28, 1930; that he had examined the photostatic copy of a bank draft sent in payment for such liquor and that the name "Henry Miller" appeared as one of the endorsers of that draft; that the deponent, using the name

Manuel Negroni, had had conversations with the defendants Henry Miller and "Jane Doe" regarding the shipment by Miller to Craig and proposed shipments of liquor by Miller to the deponent; and that the deponent had examined the contents of a shipment delivered within the Southern District of New York pursuant to an arrangement by the deponent with the defendants Henry Miller and "Jane Doe," and had found such shipment to contain intoxicating liquor fit for use for beverage purposes. (R. 39–40.)

Upon the filing of the complaint the United States Commissioner issued a warrant for the arrest of the defendants named therein. (R. 42.) The warrant and a certified copy of the complaint were delivered to Deputy United States Marshal Morgenstern, who proceeded with them in his possession to 1547 Broadway, accompanied by Special Prohibition Agents Olivera, Delmore, Guilfoyle, and Gaughan, who were to identify the persons designated in the complaint and warrant and to assist in making the arrests. (R. 16.) Olivera entered Room 604 in advance of the other officers, ostensibly to keep the appointment he had with Miller for that afternoon. Upon seeing him Miller said, "Come on in," and was leading him into the inner office when the other Agents entered. Olivera pointed out Miller to the deputy marshal, saying, "That is Henry Miller." Morgenstern then informed Miller that he had a warrant for

his arrest and placed him under arrest. Miller gave his name as Dan Lefkowitz. Following the arrest, Special Agent Delmore searched the person of Lefkowitz and took therefrom and turned over to Morgenstern the papers and articles mentioned in the affidavit made by Delmore. (R. 16–17, 19, 20, 23, 32–33.)

After the arrest of Lefkowitz the Special Agents conducted a search of Room 604, which is about 10 feet wide and 20 feet long and is divided by a partition into an outer and inner office. (R. 20, 23–24.) They found in a desk in the outer office the notebooks and papers described in the affidavit of Agent Guilfoyle (R. 24); in a desk in the inner office and in the waste-paper baskets the articles mentioned in the affidavit of Agent Delmore (R. 35); and in a towel cabinet several typewritten sheets containing the names and addresses of numerous persons throughout the United States (R. 25). These articles were seized by the Agents and eventually turned over to Assistant United States Attorney Grant. (R. 10.) No force was used by the officers in conducting the search, nor were the desks or cabinet broken into, as none was locked. (R. 25, 36.) One of the drawers in the desk in the outer office was open part way. (R. 20.)

While the search of Room 604 was in progress a young lady entered and was pointed out by Agent Olivera as the "Jane Doe" referred to in the complaint and warrant of arrest. She was placed

under arrest by Deputy Marshal Morgenstern, to whom she gave her name as Pauline Paris. (R. 17, 19, 24.) At the suggestion of Agent Olivera, she voluntarily typed, and wrote her signature on, the following letter (R. 25):

> ULYSSES GRANT,
>
> *Post Office Bldg., New York City.*
>
> MY DEAR MR. GRANT: Since everything has gone fine, I would suggest that this girl whose name is signed below be left out as soon as bail is arranged for her.
>
> Very truly yours,
>
> J. RAY OLIVER.
>
> (s) PAULINE PARIS.

As stated in the affidavit of Agent Olivera, this letter was procured by him partly with the bona fide intention of facilitating her release on bail and partly to obtain her signature and a sample of her typewriting when using the machine which was in Room 604. (R. 21, 24–25.) Olivera later arranged to have the United States Commissioner remain in his office until the prisoners were brought before him, and they were arraigned and released on bail that evening. (R. 21.)

Following a hearing, the application to suppress, etc., was denied by the District Court (R. 47), which rendered a written opinion (R. 43). Upon appeal, the order of the District Court was reversed by the Circuit Court of Appeals as to all the property seized, except that taken from the person of the respondent Lefkowitz and the letter

written by the respondent Paris, on the ground that the search and seizure were unreasonable. (R. 56.) Circuit Judge Swan, dissenting, expressed the view that the seizure was lawful except as to certain items which appeared to have no relation to the crime with which Lefkowitz was charged. (R. 60.) This Court granted a writ of certiorari to review the judgment of the Circuit Court of Appeals. (R. 62.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the search of the premises and the seizure of the books and papers were unreasonable within the prohibition of the Fourth Amendment.

SUMMARY OF ARGUMENT

The arrests were lawful (1) because made upon an arrest warrant issued upon probable cause and properly executed by an authorized officer; (2) because the arresting officers had probable cause to believe that the persons arrested had committed a felony; and (3) because such officers had probable cause to believe that those arrested were engaged in the commission of crime when the arrests took place.

The question of the extent of the privilege of arresting officers to search and seize was typically presented, in the early cases, in an action against the arresting officer for an asserted illegal seizure. The general rule was early stated to be that the arresting officer was privileged to search for and seize

articles on the person of the prisoner or otherwise in his possession which were connected with the crime as its fruits, or as the means by which it was committed, or as evidence tending to prove it.

After this Court took the view that evidence secured in violation of the Fourth Amendment is inadmissible under the Fifth Amendment, the question was presented in practically all the State courts in its present typical form, an attempt by the accused to suppress the use as evidence of the articles seized by the arresting officers. Practically all the State courts continued to adhere to the broad rule of the common law already stated, as did the texts.

Dillon v. *O'Brien and Davis,* 16 Cox. C. C. (Ex. Div. Ire.) 245, an early and leading case similar on its facts to the present, shows that the principles crystallized in the Fourth Amendment were not intended to limit the right of search and seizure incident to a lawful arrest. That case and the broad statements in the texts have been cited with approval by this Court in several cases; and in *Marron* v. *United States,* 275 U. S. 192, this Court upheld the seizure without warrant of articles used in the commission of crime as an incident of a lawful arrest, and stated that the privilege of the arresting officers to search extends to all parts of the premises used for the unlawful purpose. Since the premises in the present case were small and obviously within the immediate control of the accused, and since the articles seized were means used to

commit the offense within the rule of the *Marron* case, the search and seizure in the present case were lawful unless they fall within the recent decision of this Court in *Go-Bart Co.* v. *United States*, 282 U. S. 344.

That case held that a search and seizure incident to a lawful arrest may be unreasonable within the Fourth Amendment and that in that case they were. But the present case is lacking in most of the factors the sum of which was regarded by this Court as rendering the search and seizure in that case unreasonable. In the present case crime was being committed in the presence of arresting officer Olivera when he entered; the conspiracy was still on foot; the last overt act mentioned in the complaint had been committed only three days before the arrests; the officers had a valid warrant of arrest; they did not falsely claim to have a search warrant; they did not use force to compel the opening of locked receptacles; and the books and papers were taken from unlocked desk drawers, one of which was open, waste paper baskets, and an unlocked towel cabinet. In all these respects the present case is totally unlike the *Go-Bart* case.

There are two respects in which the present and *Go-Bart* cases are similar—the officers possessed no search warrant and the search they made was of the office generally. We submit that in the present case these facts are insufficient to render the search unreasonable. It can not be the law that arresting officers must have search warrants

in *all* cases in order to justify seizure of instrumentalities of crime within the control of the accused. The decisions of this and most other courts decisively hold the contrary.

Nor, we submit, was the search conducted by the officers in the present case a "general exploratory search" of the kind which the framers of the Constitution intended to prohibit by the Fourth Amendment. The abuse there aimed at was the practice of issuing general warrants without probable cause. The generality prohibited was not primarily the generality of the search actually conducted but the generality of the authority to search without any reasonable basis for belief that crime had been committed. This view is supported by the opinions of this Court and the language and history of the Amendment. Search incident to lawful arrest is a totally different thing. The entry is lawful, and the search pursuant to the arrest is not a general search in the hope of the discovery of evidence of the commission of *some* crime, as was the case in *Entick* v. *Carrington,* 19 How. St. Tr. 1029, but a search for the means used in committing the *particular offense* for which the arrest is made. In such a case the indefeasible right of the individual to be secure in his person and effects yields to the public interest in expediting the prosecution of one reasonably believed to be guilty of a criminal offense.

The court below failed to recognize the distinction between a search under a search warrant and one

incident to arrest. In the former case only articles specifically described in the warrant may be seized, whereas in the latter *any* instrumentality of the crime may be. Such a search is necessarily general in the sense that it is for things the existence of which can not be known until they are found, but that fact has not been regarded by this or most other courts as rendering a search incident to arrest unreasonable.

Most of the articles here seized were instrumentalities of crime within the rule of *Marron* v. *United States*, 275 U. S. 192. The fact that they provide documentary evidence of guilt does not render their seizure illegal.

ARGUMENT

I

THE ARRESTS WERE LAWFUL

The District Court held that the arrests were lawful (R. 44), and the Circuit Court of Appeals said that they were "to be treated as having been made lawfully" (R. 56). For the following reasons the Government submits that the arrests were lawful:

1. The arrests were made by a Deputy United States Marshal upon a warrant of arrest issued by a United States Commissioner and addressed to the United States Marshal or to any of his deputies. (R. 17, 42–43.) The complaint upon which the warrant issued adequately charged a conspiracy to violate the National Prohibition Act (R. 37–39), and was supported by a statement under oath by Special Agent Olivera of facts within his knowledge which were ample to show probable cause for belief that the accused had committed the offense charged (R. 40–41). Before the arrests the respondents Lefkowitz and Paris were identified by Olivera as the Henry Miller and "Jane Doe" named in the complaint and warrant of arrest. (R. 16–17.)

2. The dealings between Agent Olivera and the accused afforded reasonable ground for belief that the persons arrested had committed the felony of conspiring to violate the National Prohibition Act. *Carroll* v. *United States*, 267 U. S. 132, 156, 161; *Brady* v. *United States*, 300 Fed. 540, 543 (C. C. A. 6th), certiorari denied, 266 U. S. 620.

3. Olivera's prior transactions with the accused in Room 604 and the appointment to discuss the sale of liquor with Lefkowitz at about the time of the arrests were ample ground for belief that the conspiracy was still on foot when Olivera, upon entering the room, found Lefkowitz there appar-

ently ready to continue his business dealings and accept orders for liquor in violation of Section 19 of Title II of the National Prohibition Act, *supra*, p. 2. *Marron* v. *United States*, 275 U. S. 192, 198; *Lambert* v. *United States*, 282 Fed. 413, 417 (C. C. A. 9th); *Ash* v. *United States*, 299 Fed. 277, 279 (C. C. A. 4th).

II

SINCE THE ARRESTS WERE LAWFUL, SEARCH OF THE PREMISES WHERE THEY WERE MADE WAS LAWFUL; AND THE SEARCH MADE WAS NOT UNREASONABLE

Until *Boyd* v. *United States*, 116 U. S. 616, it was settled law that the admissibility of evidence was not affected by the illegality of the means by which it was obtained. *State* v. *Reynolds*, 101 Conn. 224, 237; *Adams* v. *New York*, 192 U. S. 585; Wigmore, Evidence (2d ed.), Sec. 2183. Hence the question of the extent of the privilege of an arresting officer to make a search did not arise in connection with the attempted suppression as evidence of the use of the articles seized upon such a search. The typical case presenting the question was an action against the arresting officer for damages for an asserted illegal seizure. *Banks* v. *Farwell*, 21 Pick. 156 (Mass. 1839); *Spalding* v. *Preston*, 21 Vt. 9 (1848); *Houghton* v. *Bachman*, 47 Barb. 388 (Sup. Ct. N. Y. 1866); *Closson* v. *Morrison*, 47 N. H. 482 (1867); *O'Connor* v. *Bucklin*, 59 N. H. 589 (1879); *Dillon* v. *O'Brien and Davis*, 16 Cox. C. C. 245 (Ex. Div. Ire. 1887); *Thatcher* v. *Weeks*, 79 Me. 547.

(1887); *Carmichael* v. *McCowen*, (1897-1903) Newfoundland 597; *Getchell* v. *Page*, 103 Me. 387 (1908); cf. *Kneeland* v. *Connally*, 70 Ga. 424 (1883); *State* v. *Robbins*, 124 Ind. 308, 310–311 (1890); *North* v. *People*, 139 Ill. 81, 107 (1891); *Newman* v. *People*, 23 Colo. 300, 310–311 (1896).

Because of the rule that the admissibility of evidence did not turn on the legality of the means by which it had been obtained, the question whether a search was authorized by the warrant under which it was made arose typically in the same manner. The famous case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029, for example, was an action of trespass against officers who had, under a general warrant, entered the plaintiff's premises, arrested him, and searched for and seized his books and papers.

The general rule was early stated to be that upon making a valid arrest the arresting officer was privileged to search for and seize articles connected with the crime either as its fruits, or as the means by which it was committed, or as evidence which would aid in securing a conviction. Such articles might be taken if on the person of the prisoner or otherwise in his possession. Bishop, Criminal Procedure (1st ed. 1866), Sec. 668; cases cited *supra*.

Boyd v. *United States*, *supra*, established that the Fourth and Fifth Amendments must be read together, and that, when so read, their effect was to render inadmissible evidence obtained in violation of the Fourth Amendment. While this doc-

trine is too firmly established in Federal law to be questioned now, its historically questionable basis[2] and its rejection by the great majority of the State courts[3] should not be forgotten when the attempt is made, as it is in the present case, to extend the effect of the Fourth Amendment far beyond its express language and original intent.

After the decision of the *Boyd* case, and especially after its application in *Weeks* v. *United States,* 232 U. S. 283, a number of State courts followed suit, overruling or ignoring their earlier decisions to the effect that evidence was not inadmissible because it had been illegally obtained (Wigmore, *supra,* Sec. 2183, 2184); and in practically all the State courts the question of the extent of the privilege of arresting officers to search and seize was then presented in its present typical form—an attempt by the accused to suppress the use as evidence of articles taken by arresting officers. Practically all the State courts continued to define the privilege according to the broad rule of the common law already stated. *Argetakis* v. *State,* 24 Ariz. 599, 606; *Pickett* v. *Marcucci's Liquors,* 112 Conn. 169, 174; *Haile* v. *Gardner,* 82 Fla. 355, 359–360; *Jenkins* v. *State,* 4 Ga. App. 859, 864;

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[2] See *Hale* v. *Henkel,* 201 U. S. 43, 71–73; *Adams* v. *New York, supra,* 192 U. S. 585, 597–598; Wigmore, *supra,* Sec. 2184, 2250, 2264; cf. *Wilson* v. *United States,* 221 U. S. 361.

[3] See *People* v. *Defore,* 242 N. Y. 13, 21. *State* v. *Reynolds, supra,* 101 Conn. 224, contains an excellent discussion of the bases of the common law rule that admissibility of evidence is not affected by the illegality of the means used in securing it.

State v. *Myers,* 36 Ida. 396, 407; *State* v. *Gorman,* 196 Ia. 237, 239; *Com.* v. *Phillips,* 224 Ky. 117; *People* v. *Cona,* 180 Mich. 641, 652; *State* v. *Rebasti,* 306 Mo. 336, 345; *State* v. *Mullen,* 63 Mont. 50, 61; *State* v. *Mausert,* 88 N. J. L. 286; *Smith* v. *Jerome,* 47 Misc. (Sup. Ct. N. Y.) 22; *Com.* v. *Grasse,* 80 Pa. Super. Ct. 480; *State* v. *Laundy,* 103 Oreg. 443, 496; *Smith* v. *State,* 299 Pac. (Okla. Crim.) 243; *West* v. *State,* 110 Tex. Cr. App. 290; *State* v. *Evans,* 145 Wash. 4, 13; *State* v. *Rudy,* 98 W. Va. 444; *Wiggin* v. *State,* 28 Wyo. 480, 491. So also the texts. Bishop, New Criminal Procedure (2d ed. 1913), Sec. 211; Wharton, Criminal Procedure (10th ed. 1918), Sec. 97.

The early approach to the present problem in a case similar to the present one on its facts is excellently illustrated by the leading case of *Dillon* v. *O'Brien and Davis,* 16 Cox C. C. (Ex. Div. Ire.) 245. There the defendants in an action for damages for an alleged illegal seizure had secured a warrant for the arrest of the plaintiff. They went to his house and entered it to execute the warrant. They found the plaintiff engaged in the conspiracy for which the warrant of arrest had issued. (The same is true in the present case. *Infra* p. 32.) The officers arrested the plaintiff and seized books and papers and a telegram which were being used in furtherance of the conspiracy. The alleged justification for the seizure was that the property so taken was necessary and material evidence in the prosecution of the offense for which the arrest had

been made. The plaintiff relied on *Entick* v. *Carrington,* 19 How. St. Tr. 1029. Since, as this Court has declared,[4] the Fourth Amendment is a crystallization of the principles enunciated by the court in the *Entick* case, it is obvious that the contention of the plaintiff in the *Dillon* case is identical with that of the respondents here. The court in the *Dillon* case gave judgment for the defendants. It said that from the earliest times it had been the settled and unvarying practice to seize proofs of guilt upon making an arrest and give them in evidence at the trial. (P. 248.) Excerpts from the opinion follow (pp. 249–251):

> I, therefore, think that it is clear, and beyond doubt, that, at least in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found *in his possession* which will form material evidence in his prosecution for that crime. * * * Its [the rule's] purpose and object, viz, to produce the goods in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law. * * * But the interest of the State in the person charged being

[4] *Boyd* v. *United States, supra,* 116 U. S. 616, 626–627, 630; *Weeks* v. *United States, supra,* 232 U. S. 383, 390.

brought to trial in due course necessarily extends, as well to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to production or preservation of this evidence, I can not see how it can be enforced otherwise than by capture. If material evidences of crime are in the possession of a third party, production can be enforced by the Crown, by *subpœna duces tecum*. But no such writ can be effective in the case of the person charged. * * * This brings me to the only case relied on by the plaintiff: (*Entick* v. *Carrington,* 19 State Trials, 1029, 1063–4.) The question there was as to the legality of a warrant, not only to seize and apprehend the plaintiff and bring him before a Secretary of State, but also to seize his books and papers. In that case there was no allegation of the plaintiff's guilt, nor that there was reasonable or probable cause for believing him guilty, nor that a crime had, in fact, been committed by anyone, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing might be evidence of) a crime committed by him or anyone else. The nature of the question there is shown by the statement of Lord Camden that "If this point should be determined in favour of the jurisdiction, the

secret cabinets and bureaux of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." Lord Camden takes pains to show that the word "papers" in the warrant could not, in point of law, be restrained to libellous papers only, and he adds: "All the papers and books, without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable that nothing is left either to the discretion or to the humanity of the officer." It was, of course, decided that that warrant was illegal; but the case, as a decision, is not in point here. *The right here claimed is not to take all the plaintiff's papers, but those only which are evidence of his guilt; and the claim is based, not as in Entick* v. *Carrington* (*19 State Trials, 1029*), *upon a warrant issued upon mere suspicion, but upon an allegation of actual guilt, and a lawful apprehension of the guilty person.* * * * *For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension, as distinguished from general warrants to seize all papers.* (Italics ours.)

On the authority of *Dillon* v. *O'Brien and Davis*, the Supreme Court of Newfoundland held that, upon making a valid arrest for the crime of arson, the arresting officer was privileged to seize, and

keep possession for three months of, the dwelling house, shop, goods, furniture, and stock which had been set fire to, for use as evidence in the prosecution. The action was trespass and trover by the owner of the house, shop, *et cetera,* against the arresting officer. *Carmichael* v. *McCowen* (1897–1903) Newfoundland 597, *supra.*

The *Dillon* case and the broad statements of the texts have been cited with approval by this Court. In *Weeks* v. *United States, supra,* 232 U. S. 383, 392, it was said:

> What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, Sec. 211; Wharton, Crim. Plead. and Practice, 8th ed., Sec. 60; *Dillon* v. *O'Brien and Davis,* 16 Cox C. C. 245. * * * Nor is it the case of burglar's tools *or other proofs of guilt* found upon his arrest *within the control of the accused.* (Italics ours.)

So also in *Carroll* v. *United States,* 267 U. S. 132, 158:

> When a man is legally arrested for an offense, whatever is found upon his person *or in his control* which it is unlawful for him

> to have and *which may be used to prove the offense* may be seized and held as evidence in the prosecution. *Weeks* v. *United States*, 232 U. S. 383, 392; *Dillon* v. *O'Brien and Davis*, 16 Cox C. C. 245; *Getchell* v. *Page*, 103 Me. 387; *Kneeland* v. *Connally*, 70 Ga. 424; 1 Bishop, Criminal Procedure, Sec. 211; 1 Wharton, Criminal Procedure (10th edition), Sec. 97. (Italics ours.)

In *Agnello* v. *United States*, 269 U. S. 20, Government agents arrested Agnello and others in the act of selling narcotics illegally, searched the persons of those arrested, and took packages of narcotics found on the table in the room where the sale was made, which was the home of Alba, one of the prisoners. The officers also searched Agnello's room, several blocks away. This Court held that the admission of the evidence obtained upon the search of Agnello's room in a prosecution against him was reversible error. It said (30, 32, 33):

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and *to search the place where the arrest is made* in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392. The legality of the arrests or of the searches and seizures made at the home of Alba is

not questioned. *Such searches and seizures naturally and usually appertain to and attend such arrests.*

* * * * *

While the question has never been directly decided by this court, it has always been assumed that one's house can not lawfully be searched without a search warrant, *except as an incident to a lawful arrest therein.* * * * *Save in certain cases as incident to arrest,* there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. (Italics ours.)

See also *United States* v. *Lee,* 274 U. S. 559, 563.

In *Marron* v. *United States,* 275 U. S. 192, prohibition officers possessing a warrant to search for and seize intoxicating liquors and articles for their manufacture found one Birdsall in charge of the described premises. Intoxicating liquors were being unlawfully sold at the time. The officers arrested Birdsall and searched the place. They found and seized quantities of intoxicating liquor, a ledger showing transactions relating to the business, and a number of bills for gas, electric light, water, and telephone service furnished the premises. It was urged that the seizure of the ledger and bills was illegal because those articles were neither described in the warrant nor on Birdsall's person when arrested. The Government contended that the seizure was justifiable either as an

incident to the execution of the search warrant or as incident to the arrest. The first contention was denied on the ground that under a search warrant only such articles may be seized as are particularly described. As to the second contention the Court said (pp. 198–199):

> When arrested, Birdsall was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold. * * * The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. *Agnello* v. *United States, supra,* 30; *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States, supra,* 392. The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors, and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose. Cf. *Sayers* v. *United States,* 2 F. (2d) 146; *Kir-*

vin v. *United States, supra; United States* v. *Kirschenblatt, supra.* The bills for gas, electric light, water, and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest.

Thus there is a substantial body of authority in this Court upholding the privilege of an arresting officer to search for and seize evidence of the crime for which the arrest is made, as indicated in the *Weeks* and *Carroll* cases, *supra,* and the means or instrumentalities used in its commission, as held in the *Agnello* and *Marron* cases, *supra;* and the privilege extends "to all parts of the premises used for the unlawful purpose." In the *Marron* case the premises searched consisted of an entire second floor of six or seven rooms; in the present case, a business office room, about ten by twenty feet, divided by a partition, which "constituted but single premises." (R. 44.) Hence the books and papers here seized as an incident of a lawful arrest were, in so far as they were means used in furthering the conspiracy for which the arrest was made, properly taken, unless the present case comes within the recent pronouncement by this Court in *Go-Bart Co.* v. *United States,* 282 U. S. 344.

In that case prohibition officers possessing an invalid warrant for the arrest of Gowen and Bartels arrested them for the felony of conspiring to violate the National Prohibition Act, falsely represented that they had a search warrant, made a thorough search of the premises, and seized papers and documents. Proceedings were brought to secure the return of the seized articles and for the suppression of their use as evidence. The Government conceded that the warrant was invalid, but contended that the arrests for felony were lawful without a warrant, and that the officers had the right, incident to the arrest, to search the premises for the means used to commit the crime.

This Court expressly assumed that the arrests were lawful. It held, however, that the search was invalid because unreasonable within the meaning of the Fourth Amendment, saying (pp. 357–358):

> There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. In April, 1929, Braidwood reported to Calhoun the existence of a conspiracy and that in pursuance of it sales and deliveries of intoxicating liquor had been made in 1927 and 1928. The record does not show any criminal overt act in 1929. Calhoun's description to O'Brien of the company's

office in detail and of Gowen and Bartels shows that he knew the place and offenders. Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases, and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306.

Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place.

We submit that the search in the present case comes within the rule held to govern in the *Marron*

case and is lacking in those factors the sum of which was regarded by this Court in the *Go-Bart* case as rendering the search there involved unreasonable:

1. When Agent Olivera entered Room 604 on the afternoon of the arrest, crime was being committed in his presence. Under the National Prohibition Act it is a crime to solicit or receive orders for liquor or give information of how liquor may be obtained. *Supra,* p. 2. The complaint charged a conspiracy to violate this provision of the Act. (R. 37.) In view of Olivera's previous dealings with Lefkowitz in Room 604 and of his appointment to meet him there at about the time of the arrests to discuss the sale of liquor and of the fact that Lefkowitz showed by his greeting that he was expecting Olivera, it seems clear that, as the District Court held (R. 44), "The offense charged in the complaint was actually in progress and was being participated in by both petitioners, in room 604, at the time they were arrested." In this respect, therefore, the instant case falls with *Marron* v. *United States* and *Dillon* v. *O'Brien and Davis,* both *supra,* and not with the *Go-Bart* case.

2. The record in the present case shows that the felonious conspiracy was still on foot when the search was made. Not only was Lefkowitz engaged in carrying on the illegal business which was the object of the conspiracy at the time of the arrest, but Agent Olivera had had a telephone conversation with the conspirator Pauline Paris only

three days before the search, in which she had declared that she was authorized to take orders for liquor and had inquired whether the liquor previously sent by Lefkowitz to Olivera was good. She then said Olivera could talk to Lefkowitz's partner to make an appointment with Lefkowitz; and the appointment for the day of the arrest was made in the conversation which followed. In the *Go-Bart* case, so far as the officers knew, there was no evidence that the conspiracy was on foot within six months of the arrest and search. Thus the cases are totally unlike in this respect also.

3. The officers in the present case did not fraudulently claim to have a search warrant, as they did in the *Go-Bart* case, nor did they use threats of force to compel the unlocking of desks and safes. The articles seized were taken from unlocked desk drawers, one of which was open, waste paper baskets, and an unlocked towel cabinet. On the ground that in the present case there was neither fraud nor threats of force to gain access to locked receptacles Judge Swan, dissenting in the court below, thought the *Go-Bart* case distinguishable from the present one (R. 61); and this Court in the *Go-Bart* case stated as one of the grounds of distinction between that case and *Marron* v. *United States* the fact that there was no threat of force in the latter. *Supra*, p. 31.

4. The officers in the present case had a valid warrant of arrest, *supra*, p. 17. They did not in the *Go-Bart* case.

In two respects the present and the *Go-Bart* cases are alike. Here, as there, the officers possessed no search warrant, and the search they made was a general search of the premises,[5] a small room where the respondents were carrying on their illegal liquor traffic. In denying validity of the search upon the latter ground alone, the Court below limited the right of search incident to lawful arrest to things known to be in the possession or under the control of the accused before the arrest is made, and the right of seizure to things found on the person of the accused or openly displayed to view. But the instruments of crime are not known to the officers before the search is made, and the courts have heretofore placed no such limitation upon the search which the arresting officers may make of the premises under the immediate control of the accused. Practically all courts, including this Court in a decision as recent as *Marron* v. *United States,* have held that the privilege of search without warrant by the arresting officer extends to such premises

[5] The latter ground was the *ratio decidendi* of the majority in the court below. Chase, J., said (R. 59): "* * * what are called general exploratory searches throughout premises and personal property are forbidden. It does not matter whether the premises are comparatively large or small, whether the articles of personal property opened and the contents examined are numerous or few, the right of personal security, liberty, and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light."

as are under the control of the one arrested. The decision of the court below runs counter to this well-settled rule. The *Go-Bart* case is said to have the same result, but the opposite inference is to be drawn from the care with which this Court, prefacing its discussion of the reasonableness of the search in that case, limited its holding to the specific facts then before it. See quotation *supra*, p. 30. It certainly can not be the law that arresting officers must have a search warrant in *all* cases in order to seize the means used in committing the crime which are found within the possession or control of the prisoner. This we submit would be the effect of the decision of the court below, except in so far as articles found on the person or plainly exposed to view are concerned.

Nor, we submit, was the search conducted by the officers in the present case a "general exploratory search" of the kind which the framers of the Constitution intended to prohibit by the Fourth Amendment. As this Court said in *Carroll* v. *United States, supra,* 267 U. S. 132, 149:

> The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

This Court has frequently pointed out that the abuse aimed at in the Fourth Amendment was the practice of making general searches *under general*

warrants issued without probable cause. That was the type of search condemned in *Entick* v. *Carrington.* That was the type of search, conducted in the colonies under writs of assistance, denounced by James Otis. That was the type of search which the framers of the Fourth Amendment must have had in mind. *Boyd* v. *United States, supra,* 116 U. S. 616, 624–627, 630; *Weeks* v. *United States, supra,* 232 U. S. 383, 390; *Marron* v. *United States, supra,* 275 U. S. 192, 195; Wigmore, Evidence (2d ed.), Sec. 2264.

The obnoxious element in such searches was the authority to make any search of place or person without any showing of probable cause for belief either that a crime had been committed for which an arrest might lawfully be made or that contraband was unlawfully possessed. It was the general authority to make any such search, not the reasonable but thorough search which might be made as an incident to a lawful arrest or under a valid search warrant, which was considered an intolerable abuse of authority. And so it is a confusion of terms to describe the search in this case as a "general exploratory search" such as is within the condemnation of the Fourth Amendment. The question mainly discussed by the court in *Entick* v. *Carrington* was the power of the Secretary of State to issue general search warrants (see quotations in *Boyd* v. *United States, supra,* 116 U. S. 616, 627–629), and the court concluded (19 How. St. Tr. 1029, 1074):

> * * * upon the whole we are all of the opinion that the *warrant* to seize and carry away the party's papers in the case of a seditious libel is illegal and void. (Italics ours.)

In *Weeks* v. *United States, supra,* 232 U. S. 383, this Court said, speaking of the practice of making searches and seizures under general warrants (p. 390):

> Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any *general authority* to search and seize his goods and papers. (Italics ours.)

See also the quotation from *Dillon* v. *O'Brien and Davis, supra,* pp. 22–24.

The language of the Fourth Amendment is apt to accomplish the result desired. It provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[6]

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[6] The Amendment does not consist of two sentences with a break after the word "violated." It is all one sentence, and the provision that no warrants shall issue except upon probable cause illustrates what is meant by the provision that the right of the people to be free of unreasonable searches and seizures shall not be violated. "The term 'unreasonable' in the constitutions of the States [identical with the Fourth

As this Court said in *Marron* v. *United States, supra,* 275 U. S. 192, 196:

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

The court in *Entick* v. *Carrington* was not dealing with a search incidental to a lawful arrest. See *Dillon* v. *O'Brien and Davis*, quoted *supra,* p. 24. Such a search is totally different from the type of search aimed at by the Fourth Amendment. Cf. *Banks* v. *Farwell, supra,* 21 Pick. (Mass.) 156, 159; *North* v. *People, supra,* 139 Ill. 81, 107. In the one case officers are authorized, by documents issued without any probable cause for belief that a crime has been committed, to make a general search of a man's personal effects in the hope that evi-

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Amendment] has allusion to what had been practiced before our revolution, and especially, to general search warrants, in which the person, place, or thing was not described." *Santo* v. *State*, 2 Ia. 165, 215 (1855). "What is meant by 'unreasonable searches and seizures' is clearly explained by the subsequent words in both Constitutions [Federal and State.]" *Banks* v. *Farwell, supra*, 21 Pick. 156, 159 (Mass. 1839). That this was the intention of the framers of the Constitution clearly appears from the contemporary statements of the proposition now embodied in the Fourth Amendment, which are to be found in the State Constitutions and the Amendments proposed by the States, and from the legislative history of the Fourth Amendment. These are set forth in Appendix B, *infra*, pp. 47–52.

dence of the commission of *some* crime may be obtained. Their entry is unlawful. In the other, officers are authorized to make an entry into a man's premises because there is probable ground for belief that he has committed a crime. Their entry is lawful. Being rightfully upon the premises (and in the present case, finding the man engaged in the commission of the crime for which the warrant of arrest issued) they are authorized, contemporaneously with the arrest, to make a search for the means used in committing the *particular crime* and for evidence to prove its commission. We submit that, having this privilege, it was not only the right of the officers, but it was their duty to make a thorough search of the premises under the control of the accused for the instrumentalities of the crime. See *Getchell* v. *Page, supra,* 103 Me. 387, 391; *Smith* v. *Jerome, supra,* 47 Misc. (Sup. Ct. N. Y.) 22; *Com.* v. *Stubler,* 84 Pa. Super. Ct. 32, 35; *State* v. *Magnano,* 97 Conn. 543, 545; *Banks* v. *Farwell,* supra, 21 Pick. (Mass.) 156, 159; *State* v. *Robbins,* 124 Ind. 308, 311. The indefeasible right of the individual to be secure in his person and effects yields to the public interest in expediting the prosecution of one reasonably believed to be guilty of a criminal offense. See quotation from *Dillon* v. *O'Brien and Davis, supra,* pp. 22–24.

The court below failed to recognize the distinction between a search authorized by a search warrant and a search authorized by a lawful arrest.

As held by this Court in *Marron* v. *United States, supra,* 275 U. S. 192, nothing can be searched for and seized under a search warrant except that which is specifically described in it, whereas upon a lawful arrest the arresting officers have the right to search for and seize *any* articles used in the commission of the offense for which the arrest is made. A search of the latter sort is necessarily general in the sense that it is for things the existence of which can not be known until they are found. In the *Marron* case the officers were not aware of the existence of the ledger until they found it in the closet. The fact that they were not searching for definite and specific articles used in the commission of the crime was not regarded by this Court as rendering the search objectionable as a general exploratory search for evidence. See also *Dillon* v. *O'Brien and Davis, supra,* 16 Cox. C. C. 245. Searches "general" in this sense as well as in their scope have been upheld by the State courts as incidents of lawful arrests. *Argetakis* v. *State, supra,* 24 Ariz. 599, 604; *Pickett* v. *Marcucci's Liquors, supra,* 112 Conn. 169; *Com.* v. *Phillips, supra,* 224 Ky. 117; *Smith* v. *Jerome, supra,* 47 Misc. (Sup. Ct. N. Y.) 22; *Com.* v. *Stubler, supra,* 84 Pa. Super. Ct. 32. See also *Dillon* v. *O'Brien and Davis, supra,* 16 Cox C. C. 245; *Carmichael* v. *McCowen, supra,* (1897–1903) Newfoundland 587.

In the brief in opposition to the petition for certiorari respondents argue (pp. 26–28) that the

papers seized in this case were not means used in committing crime but mere evidence of the commission of crime. This contention is difficult to reconcile with *Marron* v. *United States*. In that case this Court held, in language quoted *supra*, pp. 28–29, that the ledger showing transactions relating to the business and the various bills for gas, electric light, water, and telephone service were means used to commit crime within the rule permitting search and seizure pursuant to lawful arrest. The fact that such articles may furnish documentary proof of guilt does not, we submit, render the search unreasonable. The contrary is the effect of the decision in the *Marron* case and of many of the other numerous decisions in which searches and seizures incident to arrest have been sustained.

The District Court below examined those seized papers which had not been returned and found none whose retention he regarded as unlawful within the authorities. (R. 44, 45.) Judge Swan, in his dissenting opinion in the Circuit Court of Appeals (R. 60), said that Items 2, 3, 4, and 10 (R. 24) "do not appear to have any relation to the crime with which Lefkowitz was charged." He considered the other items (R. 24, 25, 35), which were apparently used in connection with the illegal conspiracy, to have been validly seized. The majority opinion did not discuss this question. The Government does not contend that items which appear to have no relation to the crime should not be returned. It

does contend, however, that most of the articles here seized were "things used to carry on the criminal enterprise" within the rule of *Marron* v. *United States*, and that the court below erred in directing that the use of these articles as evidence be suppressed. The articles are listed, with references to the record, in Appendix A, *infra*, pp. 45–47.

Respondents also argue in the brief in opposition to the petition for certiorari (p. 27) that the arresting officers in the present case did not know at the time of the seizure whether the documents were means used to commit crime, and that the position of Judge Swan that only articles unrelated to the crime should be returned is at variance with constitutional principles in making the validity of the seizure depend on what is seized. But the situation was the same in the *Marron* case. The officers there did not know whether the ledger they had seized was a means used in committing crime until they had opened it and examined its contents, nor whether the bills were until each had been scrutinized.

We submit that the search in this case comes within the rule held to govern in the *Marron* case, and is lacking in those factors the sum of which was regarded in the *Go-Bart* case as rendering unreasonable the search there involved. Under the construction of the latter decision by the court below, practically nothing is left of the rule that a search may be made as incident to a lawful arrest.

CONCLUSION

The judgment of the Circuit Court of Appeals was erroneous. It should therefore be reversed.

Respectfully submitted.

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JANUARY, 1932.

APPENDIX A

The articles taken by the prohibition agents during their search of Room 604 are listed in the affidavits of Agents Delmore and Guilfoyle. The following articles were taken from the desk in the outer office (R. 24):

1. Black leather covered loose leaf notebook, containing alphabetical list of names and addresses.

2. An envelope marked room 604, 1547 Broadway, New York City, containing a 1929 New York State motor vehicle registration certificate 5 Y–2555, issued to Milton Hordish, 635 Kelly Street, Bronx, N. Y., for a 1929 Nash sedan.

3. A bill or statement amounting to $25 addressed to Herman Bernstein, c/o Bernstein & Lefkowitz, 1547 Broadway, New York City, apparently sent by doctors whose names appear on the statement.

4. Business card bearing the name of Dave Scherl, giving his address and telephone number and residence telephone number.

5. A number of business cards reading as follows:

Dan Lefkowitz Herman Bernstein
LEFKOWITZ & BERNSTEIN
1547 Broadway
New York City
Chickering 4–8928 Room 604

6. About 25 sheets of typewriter paper with the heading thereon of "William Salmon, 1547 Broadway, room 604."

7. About 75 envelopes addressed to various persons throughout the United States,

some of which contained undated letters bearing the typewritten signature "William Salmon" to the effect that he had made his yearly change of name from "Henry Miller" to "William Salmon" and that he had received a new stock of merchandise that was for sale.

8. A cardboard covered loose leaf binder, containing an alphabetical typewritten list of names and addresses.

9. A stenographer's notebook and textbook.

10. Three raffle books.

From the desk in the inner office Agent Olivera took a bottle partly full of alcohol; a telephone address book containing names of persons and telephone numbers; a business card; a blank order book with some of the slips torn out; and several business cards of Bernstein & Lefkowitz. (R. 35.)

From the two wastepaper baskets torn scraps of paper were taken which, when pasted together, formed the following (R. 35):

Edison Company electric light bill from October 31 to December 3, 1930, for room 604, at 1547 Broadway, reading No. 6223; bill addressed to Herman Bernstein at 1547 Broadway.

Edison Company electric light bill from December 3, 1930, to January 5, 1931, for room 604, at 1547 Broadway, reading No. 6248; bill addressed to Herman Bernstein at 1547 Broadway.

Unsigned letter from Lefkowitz & Bernstein, 1547 Broadway, to L. Lieberman, 34 E. 12th Street, New York City, for merchandise delivered, $80.

Some 32-odd salesmen's order slips for intoxicating liquor with customers' names and addresses.

N. Y. Telephone Co. receipt No. 6225 dated January 8, 1931, acknowledging having received from Daniel Lefkowitz sum of $14.26 for telephone service, Chic. 4–8928.

A pencil memorandum containing some 35 names with amounts set after the respective names, some of these names being Myers, Gordon, French, and K.

A pencil memorandum containing names with amounts set after the names, one of them being Dan, $537, the total amount of the memorandum being $1,497.95.

From the towel cabinet the agents took several typewritten loose-leaf sheets unbound, bearing names and addresses of numerous people throughout the United States. (R. 25.)

APPENDIX B

EARLY STATE CONSTITUTIONS

Article 10 of the Bill of Rights of Virginia (1776) provided (7 Thorpe, American Charters, p. 3814):

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Article 23 of the Declaration of Rights of Maryland (1776) provided (3 Thorpe, *supra*, p. 1688):

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants—to search suspected places, or to apprehend

> suspected persons, without naming or describing the place, or the person in special—are illegal, and ought not to be granted.

Article 11 of the Declaration of Rights of North Carolina (1776) was substantially identical with the Virginia provision, *supra*. See 5 Thorpe, *supra*, p. 2788.

Article 10 of the Declaration of Rights of Pennsylvania (1776) provided (5 Thorpe, *supra*, p. 3083):

> That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.

Article 11 of the Declaration of Rights of Vermont (1777) was substantially identical with the Pennsylvania provision, *supra*. See 6 Thorpe, *supra*, p. 3741.

Article 14 of the Declaration of Rights of Massachusetts (1780) provided (3 Thorpe, *supra*, p. 1891):

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one

> or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Article 19 of the Bill of Rights of New Hampshire (1784) was substantially identical with that of Massachusetts, *supra*. See 4 Thorpe, *supra*, p. 2456.

FORMS OF THE AMENDMENT PROPOSED BY THE STATES

The 14th clause of the Declaration of Rights proposed by Virginia in ratifying the Federal Constitution (1788) provided (Madison, Debates in the Federal Convention [International Ed. 1920], p. 661):

> That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and his property; all warrants, therefore, to search suspected places, or seize any freeman, his papers or property, without information upon Oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general Warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted.

In ratifying the Federal Constitution (1788), New York declared (Madison, *supra*, p. 667):

> That every Freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his prop-

> erty, and therefore, that all Warrants to search suspected places or seize any Freeman, his papers, or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive; and that all general Warrants (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted.

The 14th article of the Declaration of Rights proposed by North Carolina in ratifying the Federal Constitution (1789) was substantially identical with the Virginia proposal, *supra*. See Madison, *supra*, p. 676.

In ratifying the Federal Constitution (1790), Rhode Island made a declaration substantially identical with that of New York, *supra*. See Madison, *supra*, p. 682.

PROCEEDINGS IN CONGRESS

As presented to the House of Representatives of the First Congress by Madison, the Fourth Amendment read (1 Gales, Annals of Congress, pp. 434–435):

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

The following took place at the meeting of the Committee of the Whole House on Amendments (Gales, *supra*, p. 754):

> The committee went on to the consideration of the seventh clause of the fourth

proposition, being as follows: "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized."

Mr. GERRY said he presumed there was a mistake in the wording of this clause; it ought to be "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches," and therefore moved that amendment.

This was adopted by the committee.

MR. BENSON *objected to the words "by warrants issuing." This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read "and no warrant shall issue."*

The question was put on this motion, and lost by a considerable majority.

Mr. LIVERMORE objected to the words "and not" between "affirmation" and "particularly." He moved to strike them out, in order to make it an affirmative proposition.

But the motion passed in the negative.

The clause as amended being now agreed to * * *. (Italics ours.)

The Amendment in this form was adopted by the House a few days later. Gales, *supra*, p. 767.

The report of the proceedings in the Senate is scanty, since it sat behind closed doors. 1 Gales, *supra*, p. 16. After some debate (1 Gales, *supra*, pp. 74, 75, 76), some of the proposals of the House were agreed to and some were not, and the House

was notified. (Gales, *supra*, pp. 77, 889.) Apparently the Senate made some proposals itself, since it is reported that the House took into consideration the Amendments to the Constitution as amended by the Senate (1 Gales, *supra*, p. 903), agreed to some and disagreed to others (1 Gales, *supra*, p. 905), and asked for a conference on those disagreed to (1 Gales, *supra*, p. 83). The Conference Committee's recommendations were followed by the House (1 Gales, *supra*, p. 913) and the Senate (Gales, *supra*, p. 88), and the proposed forms of amendment were then ordered sent to the President (1 Gales, *supra*, pp. 913–914).

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FILE COPY

No. 465

Supreme Court of the United States

OCTOBER TERM, 1931

UNITED STATES OF AMERICA,

Petitioner,

against

DANIEL M. LEFKOWITZ AND PAULINE PARIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION

DAVID P. SIEGEL,
Attorney for Respondents.

INDEX

BRIEF IN OPPOSITION TO PETITION:

PAGE

Opinions below 1

Jurisdiction 1

Statement 2

Argument—

The arrests though lawful did not justify a ransacking and exploratory search of the premises 6

Conclusion 29

CITATIONS:

Agnello v. *United States*, 269 U. S. 20 ..... 8, 28

Boyd v. *United States*, 116 U. S. 616 ..... 7, 14-15

Byars v. *United States*, 273 U. S. 28 27

Carroll v. *United States*, 267 U. S. 132 ..... 7, 28

Federal Trade Comm. v. *American Tobacco Co.*, 264 U. S. 298 ..... 8, 16-17, 22-23

Flagg v. *United States*, 233 Fed. 481 8

Go-Bart Importing Co. v. *United States*, 282 U. S. 34 ..... 6, 8-10, 12-13, 25, 26, 29

Gouled v. *United States*, 255 U. S. 295 ..... 7, 8, 15-16

Hale v. *Henkel*, 201 U. S. 44 ..... 8, 16

PAGE

In re 191 Front St., 5 Fed. (2nd) 282.....8, 20, 26

Marron v. *United States*, 275 U. S. 192, 7, 10, 11-12, 13, 29

Silverthorne v. *United States*, 251 U. S. 385..... 6

United States v. *Epstein*, 33 Fed. (2nd) 982..... 8

United States v. *Kirschenblatt*, 16 Fed. (2nd) 202.....8, 17-19, 26

United States v. *Lee*, 274 U. S. 559..... 28

United States v. *1013 Crates, etc.*, 52 Fed. (2nd) 49.....8, 20-21

United States v. *McHie*, 194 Fed. 894.....21-22

United States v. *Mills*, 185 Fed. 318.....8, 20

United States v. *Mounday*, 208 Fed. 186.....8, 23

Weeks v. *United States*, 232 U. S. 383.....6, 8, 17

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OPINIONS BELOW

The opinion of the District Court (R. 84) is reported in 47 Fed. (2nd) 921. That of the Circuit Court of Appeals (R. 114) is reported in 52 Fed. (2d) 52.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 21, 1931 (R. 119). The jurisdiction of this Court to issue the writ applied for is invoked under

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT

By an independent proceeding instituted by an order to show cause (R. 3) before the return of any indictment (R. 18) Daniel M. Lefkowitz and Pauline Paris made an application for the suppression of evidence and the return of books and papers seized and taken from Room 604 in 1547 Broadway, New York City. Room 604 was the office of "The Southern Agency" under which name and style Daniel M. Lefkowitz transacted business (R. 24). Pauline Paris, a stenographer and typist, was an occupant of the same office (R. 25).

The order to show cause was directed to the United States Attorney for the Southern District of New York (R. 3) and was supported by the affidavits of the respondents (R. 5-16). The United States Attorney for the Southern District of New York appeared in opposition to the order to show cause. Affidavits of a Deputy United States Marshal and of the Special Agents of the Department of Justice, Bureau of Prohibition, together with the affidavit of the Assistant United States Attorney in charge of the case were filed (R. 17-70). As exhibits to the said affidavits there was also filed a copy of the warrant of arrest (R. 82-83), a copy of the complaint upon which the said warrant was based (R. 71-81) and a copy of the indictment filed in the United States District Court for the Southern District of New York after the service of the said order to show cause, which said

indictment named as defendants the respondents herein, together with one Herman Bernstein (R. 23-28).

The United States Attorney also submitted to the Court all of the papers and articles seized at the time of the search and seizure (R. 65). Said papers and articles were not printed in the record but were before the Circuit Court of Appeals in their original form pursuant to stipulation (R. 110-111).

The arrests were made in a room 20 feet long and 10 feet wide. The office was divided by a partition and was fitted up with the usual articles of office furniture (R. 38, 45). All of the books, papers and articles seized were found in one or another of the pieces of furniture in the premises (R. 11, 46, 47, 49, 67-68). The papers so seized were first kept in custody by the special agents, but after the service of the order to show cause were turned over to the Assistant United States Attorney, Ulysses S. Grant, upon whom due demand was made for their return, which said demand was refused (R. 14, 19, 20).

The search and seizure followed the filing of a complaint before United States Commissioner Garrett W. Cotter (R. 71-81), who thereupon issued a warrant for the arrest of Henry Miller, "Jane Doe", "Richard Roe" and "John Doe" for an alleged violation of Section 37 U. S. C. C. (R. 82). The warrant was executed by a Deputy United States Marshal in the company of special agents of the Department of Justice, Bureau of Prohibition, on the afternoon of January 12, 1931 (R. 32). Of the persons named in the warrant only two were arrested and arraigned. The "Henry Miller" named in the

warrant was arraigned under the name of Daniel Lefkowitz (R. 83) and the "Jane Doe" named in the warrant was arraigned under the name of Pauline Paris (R. 83).

At the time the order to show cause issued, the other persons referred to in the warrant had not been apprehended. One Benjamin Williams who was not named in the warrant, but who was on the premises when the warrant was executed, was also taken into custody (R. 83), but subsequently discharged upon motion of the Assistant United States Attorney (R. 22).

Special Agent Olivera was the first to enter room 604 in 1547 Broadway. Lefkowitz and Williams were the only persons then in the room. Olivera remained at the entrance to the suite (R. 37). Immediately after his entry into the premises he gave a pre-arranged signal to Special Agent Delmore (R. 64), who notified the other agents waiting on the floor below and within two minutes from the time Olivera entered the room the other agents joined him there (R. 32, 37, 44, 64).

As the agents entered Lefkowitz was standing at the door of the inner office. He was identified as the Henry Miller in the warrant by Olivera and the Deputy United States Marshal placed him under arrest, at which time he gave his name as Daniel Lefkowitz (R. 32, 33). No copy of the warrant was given to Lefkowitz at this time or at any other time (R. 12).

Following the arrest, Special Agent Delmore searched the person of Lefkowitz and took therefrom and turned over to the Deputy United States Marshal certain papers and articles. These were later turned over to Assistant United States Attorney Grant (R. 33, 39, 49, 64-65). All

this was done over the objection and without the consent of Lefkowitz (R. 12, 14).

The search of Lefkowitz' person concluded, the special agents conducted an exploratory investigation throughout the premises and indiscriminately seized papers and documents from all of the articles of furniture therein contained (R. 38, 45). Not only were the desks in the office ransacked (R. 11, 38, 45, 47, 67-68), but the search included a towel cabinet and waste-paper baskets (R. 67, 68). During the progress of the search the respondent Pauline Paris entered the rooms and was placed under arrest (R. 33, 38, 37).

Upon the completion of the search and seizure in the premises the respondents were taken before Commissioner Cotter for arraignment and were released on bail (R. 41). Although many documents and other records were seized, no receipt of any kind whatsoever was given to the respondents after the conclusion of the search and seizure. No search warrant ever issued directing any search and seizure (R. 12). Save for a small bottle of alcohol found in the desk in the inner office (R. 68) and a bottle of liquor on the person of Williams, who was not connected with the respondents, no liquor was found in the premises.

The District Court denied the application of the respondents in a written opinion (R. 84), but its ruling was in part reversed by the Circuit Court of Appeals on the ground that the search and seizure were unreasonable (R. 114). Circuit Judge Swan dissented (R. 118).

ARGUMENT

THE ARRESTS THOUGH LAWFUL DID NOT JUSTIFY A RANSACKING AND EXPLORATORY SEARCH OF THE PREMISES; SUCH A SEARCH VIOLATES THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE FRUITS OF SUCH A SEARCH MUST BE SURPRESSED AS EVIDENCE.

While the respondents were lawfully taken into custody under the color of a warrant for their arrest (R. 82, 83), nevertheless such a circumstance is no basis in fact or in law for a thoroughgoing ransacking and rummaging of the premises in which the arrest takes place. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344.

Lawless enforcement of the law by the duly constituted authorities by means of unreasonable searches and seizures is a proposition which this Court has always severely criticized and discountenanced. *Weeks* v. *United States*, 232 U. S. 383; *Silverthorne* v. *United States*, 251 U. S. 385.

This Court has repeatedly refused to lend the weight of its authority and give the stamp of its approval to general exploratory searches for evidence. Such searches have been deemed violative not only of the protection afforded against unreasonable searches and seizures, by the Fourth Amendment, but also as violative of the guaranty against compulsory self-incrimina-

tion embodied in the Fifth Amendment. *Boyd* v. *United States,* 116 U. S. 616; *Gouled* v. *United States,* 255 U. S. 295; *Marron* v. *United States,* 275 U. S. 192.

The case at bar involves a construction of that clause of the Fourth Amendment to the Constitution of the United States which declares:

> "The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

This Court, through the late Chief Justice Taft, in *Carroll* v. *United States,* 267 U. S. 132, 149, stated:

> "The fourth amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will serve public interests as well as the interests and rights of individual citizens."

That this amendment was directed against the evils of the Writs of Assistance and general search warrants which had been so vehemently contested prior to the Revolution, is a fact too well known to need more than passing reference. To prevent the repetition of the general and exploratory searches that had been perpetrated under the protection of those devices, to prevent the unlimited seizure of a man's papers and property, was the guiding principle of this amendment.

Boyd v. *United States,* 116 U. S. 616, first enunciated the rule that a wholesale seizure of documents constituted an unreasonable search and seizure. In succeeding decisions this Court has repeatedly reaffirmed this

principle. *Weeks* v. *United States,* 232 U. S. 383; *Gouled* v. *United States,* 255 U. S. 298; *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298; *Agnello* v. *United States,* 269 U. S. 20; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344; *Cf. Hale* v. *Henkel,* 201 U. S. 44.

These principles have been vigorously enforced in the Circuit Courts of Appeal and in the District Courts. *Flagg* v. *United States,* 233 Fed. 481 (C. C. A. 2nd); *In re: 191 Front Street,* 5 Fed. 2nd 282 (C. C. A. 2nd); *United States* v. *Kirschenblatt,* 16 Fed. 2nd 202 (C. C. A. 2nd); *United States* v. *1013 Crates, etc.,* 52 Fed. (2nd) 49 (C. C. A. 2nd); *United States* v. *Mills,* (D. C. N. Y.) 185 Fed. 318; *United States* v. *Mounday* (D. C. Kan.) 208 Fed. 186; *United States* v. *Epstein* (D. C. N. Y.) 33 Fed. 2nd, 982.

These cases involve in one way or another the limit of a search of the premises where a lawful arrest took place. Uniformly they condemn the practice of general exploratory searches.

Go-Bart Importing Co. v. *United States,* 282 U. S. 344, is the most recent application of the doctrine by this Court. Bartels, the secretary and treasurer of the corporation, was in the company's offices in New York City when the Special Agents arrested him. His person was searched. Gowen, the president of the company, subsequently entered the office and was arrested and searched. Keys were found on his person, and the Special Agents directed him to open a desk and the safe in the office from which papers were taken. From other parts of the office papers, journals, account books, letter

files, insurance policies, cancelled checks and index cards were taken. The government claimed that Gowen and Bartels sold intoxicating liquors and that at the company's office they exhibited and took orders for intoxicating liquors some of which were delivered there and some of which were delivered elsewhere. The office of the Go-Bart Importing Co. consisted of a suite of three rooms. Approximately a dozen bottles of assorted intoxicating liquors were found on the premises in addition to the papers and documents. No search warrant had issued and this Court considered the warrant of arrest as insufficient on its face, but assumed, as the lower courts had held, that the arrests were lawful and valid. In discussing the validity of the search and seizure, Mr. Justice Pierce Butler, referring to the Fourth Amendment, stated (282 U. S. at 357-358):

> "This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. *Agnello* v. *United States,* 269 U. S. 20, 33. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Boyd* v. *United States,* 116 U. S. 616, 623. *Weeks* v. *United States, supra,* 389-92.

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. * * * Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306."

Marron v. *United States*, 275 U. S. 192 is not contrary to the ruling in the *Go-Bart* case. In that case there was no general exploratory search as occurred in the *Go-Bart* case or in the case at bar. As was said by Judge Chase in the majority opinion of the Circuit Court of Appeals for the Second Circuit in the case at bar, the *Go-Bart* case is controlling here. Judge Chase wrote as follows (R. 117):

> "One of these, and the only one we need to mention now, is the firmly rooted proposition that what are called general exploratory searches throughout premises and personal property are

forbidden. It does not matter whether the premises are comparatively large or small, whether the articles of personal property opened and the contents examined are numerous or few, the right of personal security, liberty and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. The legal principles which protect all men equally loom as large at one time as at another, and forbid the search and seizure. Such a search and seizure as these officers indulged themselves in is not like that in *Marron* v. *United States,* 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made. The decision that does control is *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed—. Indeed this case differs in its essential facts from that one so slightly that what is said in that opinion characterizing the search made will apply with equal force to this one, which must accordingly be held unreasonable."

In the *Marron* case prohibition officers having a search warrant entered a speakeasy and arrested one Birdsall who was in charge of the place. Marron was not then present. The agents searched for and found large quantities of liquor. In the course of the search they came upon a grey ledger which was in a closet on the premises. Beside the cash register they found a number of bills for electric light, gas, water, and telephone service furnished on the premises. They seized

the grey ledger and the bills. Marron petitioned for the suppression of this evidence. His petition was denied, and the evidence was admitted upon the trial over his objection and exception. Marron was convicted. The case came before this Court on a Writ of *Certiorari*. This Court held that the seizure of the grey ledger and the bills was not authorized by the search warrant. 275 U. S. 192, 198. It was held, however, that as an incident to the lawful arrest the agents could contemporaneously search the premises "in order to find and seize the things used to carry on the criminal enterprise * * *". This Court held that the grey ledger was part of the equipment actually used to commit the offense of maintaining a nuisance and that it was in the "immediate possession and control" of Birdsall. Mr. Justice Butler said at page 199:

> "The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose."

By this language this Court did not mean to sanction general exploratory searches for evidence, as is apparent from the language in which Mr. Justice Butler distinguishes the *Marron* case from the *Go-Bart* case. He states at page 358 of 282 U. S.:

> "Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a con-

spiracy was actually engaged in running a saloon. As an incident of the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. *There was no threat of force or general search or rummaging of the place.*" (Italics ours.)

And this absence of a general exploratory search was emphasized by the Attorney General of the United States in his brief in opposing the petition for a writ of *certiorari* in the *Marron* case. At pages 11-12 in that brief the following statement with reference to *United States* v. *Kirschenblatt, infra,* appears:

"* * * but the record in that case showed that to disclose the incriminating documents the officers ransacked the premises in a high-handed way, not to discover contraband articles described in the warrant but merely to obtain incriminating documents, and it was for this reason that the United States made no application for *certiorari* to review that decision.

"There was in the instant case no rummaging among defendant's papers for incriminating evidence.

"* * * They had no warrant for the seizure of papers, nor was any general search made therefor. The documents seized were incidentally discovered while the officers were searching for liquor."

The sharp criticism by this Court of the outrageous nature of the search and seizure in the *Go-Bart* case is indicative of the fact that this Court has not departed

from the principles which first found expression in *Boyd* v. *United States.* In that case this court held unconstitutional a statute which required a defendant to produce in Court his private papers, invoices and books in a forfeiture proceeding and for failure so to do to have the allegations in the libel taken as confessed. Mr. Justice Bradley thoroughly examined the historical background underlying unreasonable searches and seizures, and wrote as follows:

> "The search and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained or of using them as evidence against him. The two things differ *toto coelo.* In the one case the government is entitled to the possession of the property; in the other it is not * * *. By the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property. * * *
>
> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense. It is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible

> and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other."

In the brief in support of the petition for a writ of *certiorari* herein, at page 22, the Solicitor General states the following:

> "The court below failed to recognize the distinction between a search authorized by a search warrant and a search authorized by a lawful arrest."

Such a distinction does not in fact exist. General exploratory searches for evidence have always been condemned by this Court whether they are incidents of a lawful arrest or pursuant to a search warrant. *Gouled* v. *United States, supra,* is an example of this assimilation of doctrine. In that case certain papers were seized under a search warrant. Mr. Justice Clarke wrote as follows at page 309 of 255 U. S.:

> "Although search warrants have thus been used in many cases ever since the adoption of the constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless, it is clear, at common law, and as the result of the *Boyd* and *Weeks* cases, *supra,* they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but they may be resorted

> to only when a primary right to such search and seizure may be found in the interests which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders a possession of the property by the accused unlawful and provides that it may be taken."

General exploratory searches are within the proscription of the Fourth Amendment even where there is not an actual physical rummaging of the premises. *Hale* v. *Henkel*, 201 U. S. 44. There a subpoena *duces tecum* was held to be too broad and in the nature of the general search warrants prohibited by the Fourth Amendment. Upon analogous principles this Court restricted the power of the Federal Trade Commission to compel the production of records for inspection and making copies. *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298. Writing for a unanimous bench, Mr. Justice Holmes declared (264 U. S. at 305, 306):

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions in the fire (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479, 14 Sup. Ct. 1125), and to direct fishing expeditons into private papers on the possibility that they may disclose evidence of crime."
>
> * * * * * * * *
>
> "It is contrary to the first principles of justice to allow a search through all of the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this

Court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 29 Sup. Ct. 115, and as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335."

Weeks v. *United States*, 232 U. S. 383, is another illustration of the application of the rule. There, the search and seizure had been made without the authority of a search warrant. The defendant had previously been arrested without a warrant by State Police Officers, who thereupon went to his home and searched the premises, turning over papers seized to the United States Marshal. A second search was made the same day by the United States Marshal in the company of the police officers. This Court held that this wholesale seizure of papers was so unreasonable that, if upheld, it would render the protection of the Fourth Amendment of no value.

With the same principles in mind as to the limitations upon the scope of a search and seizure upon a lawful arrest, the Circuit Court of Appeals for the Second Circuit held a search and seizure of documents under circumstances similar to those in the case at bar to be illegal in *United States* v. *Kirschenblatt*, 16 Fed. (2nd) 202.

In that case the special agent, with a search warrant for a general search of the premises, went to the defendant's offices, arrested him and made a thorough search thereof. A small amount of liquor and a large quantity of papers including account books, customers lists and

letters, were seized. Holding that the search warrant and the arrest were legal, the Circuit Court of Appeals stated that the only question was that as to the scope of the search under the warrant or as an incident to the arrest.

Judge Learned Hand wrote as follows at page 203 of 16 Fed. (2d):

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition."

He concluded as follows at page 204:

> "It is seldom that one finds a document containing evidence of crime which was not at one time used in its commission; the papers important in any prosecution are ordinarily either com-

> munications passing between the actors or records necessary to keep track of the details. These are all that the prosecution requires, and all that, except in rare instances, it will ever get. They cannot be reached, except by a thorough search of all that the offender has, to allow which would be to countenance exactly what the amendment was designed to prevent. Therefore, while we agreed that it is no answer to a search to say that papers have been seized, we cannot agree that the power extends beyond those which are a part of the forbidden act itself. It would be hazardous to attempt any definition; we shall not.
>
> "The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all these may be contraband and subject to seizure when found on the premises. But the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon such search warrant."

In an earlier case the Circuit Court of Appeals for the Second Circuit held that a search warrant directing the seizure of "any books, papers, records or documents pertaining to the sale, possession or transportation of intoxicating liquors" was improvidently issued and that the said search warrant must be quashed and everything seized thereunder returned, and the evidence suppressed. *In re 191 Front Street,* 5 Fed. 2nd 282. The records and documents seized in that case included books, papers and records consisting of memoranda, telegrams, in-

voices, receipts and various letters. It was held that these papers and documents were not instruments of crime; but merely some evidence of crime, and could not be seized as an incident to the arrest since "the distinction has been recognized between what one carries about on his person and what one keeps in his house."

In *United States* v. *Mills,* 185 Fed. 318, the defendants were lawfully arrested for a conspiracy to violate the Customs Laws and at the time of their arrest the United States Marshal searched for, found, seized and removed from the premises a large number of books and papers concerning the alleged fraudulent importation and all other business of defendant. These were turned over to the United States Attorney.

The District Court ordered the return of the seized papers holding that a comprehensive seizure of a person's books and papers in the premises where an arrest is made constituted an unreasonable search and seizure in violation of the Fourth Amendment.

Nor are exploratory searches countenanced merely because the fruits thereof are contraband. *United States* v. *1013 Crates, etc.,* 52 Fed. (2nd) 49 (C. C. A. 2nd). There admittedly contraband property had been seized without a search warrant; the agents sought to justify it as incident to a lawful arrest. Condemning the search, Circuit Judge Chase wrote as follows:

> "They [searches] are unreasonable, and because so, unlawful when the arrest may fairly be said to have been but an excuse for a general exploratory search. Such searches are uniformly without the law whether conducted under the pretended authority of a search warrant or in

> the guise of a mere incident of a lawful arrest. *Go-Bart Co.* v. *United States,* 282 U. S. 344. * * * No period of freedom from such an evil, however long it may be, should lull us into a false sense of security and lead us to permit this always necessary safeguard of liberty to be weakened in exchange for the temporary advantage of more thorough or certain enforcement of some law, however beneficial."

In *United States* v. *McHie,* 194 Fed. 894 (D. C., Ill., 1912), a quantity of books and papers were seized by Government agents in a raid upon an alleged bucket shop. The agents had obtained a warrant for the arrest of one McHie based upon alleged violations of Section 215 of the U. S. C. C. (using the mails to defraud). The agents went to the office of the Capital Investment Company in order to execute the warrant of arrest. McHie was not present. Nevertheless the agents arrested all persons then in the offices (some seventeen in number) and seized all of the company's records. No search warrant had ever been issued. In opposition to the petition of the Capital Investment Company for the return of the papers and documents the Government contended that the search and seizure was justified as an incident to a lawful arrest without a warrant for a felony being committed in the presence of the agents and that the documents were being used in the perpetration of that felony. District Judge Sanborn, in granting the company's application, wr[illegible] as follows at page 898:

> "Moreover, it would be a most surprising extension of the law of arrest without warrant to justify the seizure of peaceable persons sitting

quietly in their offices, on the ground that they were carrying on some business made criminal by some statute, or had formerly committed such an offense. On this theory all the officers, agents, and servants of the American Tobacco Company, for example, would be subject to arrest without warrant by anyone, officer or layman, because they were prosecuting an unlawful combination. Such a doctrine has no foundation either in reason or necessity, and is utterly opposed to the Fourth Amendment to the Constitution."

At page 897, Judge Sanborn wrote:

"Even in such desperate cases as counterfeiting, the rules of the Secretary of the Treasury expressly deprecate arrests without warrant, and prohibit searches and seizures without a search warrant, except in cases of arrest. Secret Service Rules, arts. 3, 9. Seizure under subpoena *duces tecum* so broad as to be invalid as too general under *Hale* v. *Henkel,* 201 U. S. 44, is a mild proceeding compared with an arbitrary and illegitimate proceeding like this. The absolute necessity of constitutional restraint on official power is shown to a demonstration by this record."

Flagg v. *United States,* 233 Fed. 481, also involves the scope of a search and seizure upon an arrest. There too, after the arrest of the defendant a wholesale search and seizure was made of all the books and papers in the premises where the arrest was made. There too, no search warrant authorized the seizure and the Circuit Court of Appeals for the Second Circuit held that "the constitutional rights of the defendants were violated by

the unlawful seizure of his books and papers by the officers and agents of the United States, acting without warrant or pretense of legal authority."

A further illustration is to be found in *United States* v. *Mounday*, 208 Fed. 186. After arresting the defendants under a warrant for violations of the postal laws, a search was made of the office in which the arrest was made and a large volume of letters, writings and documents were carted away. No search warrant there authorized the wholesale and indiscriminate seizure of these books and papers. The District Court held that there was no right of any kind or nature to justify such a search and seizure and that it involved a "flagrant violation of defendant's conceded constitutional rights" and that the fruits of the unreasonable search and seizure must therefore be suppressed.

In the case at bar the Special Agents made a most thorough and ransacking search of the premises at 1547 Broadway (R. 6, 11 to 14). From an examination of the very affidavits with which the government sought to oppose the application in the District Court, there is a clear indication that no portion of the premises was overlooked in the government's anxious search for incriminatory evidence (R. 38, 39, 45-47, 67-68). Even Special Agent Olivera, who claimed to have been on the premises prior to the date of the arrest and search and seizure, could not in his affidavit (R. 35-41) nor in his complaint (R. 71-81) state that liquor was stored on the premises in any manner whatsoever. The discovery of a small bottle of alcohol (R. 68) is insignificant since this Court can take judicial notice of the fact that this substance is very useful in the proper care of typewriters. The liquor

found on the person of Williams (R. 45) was not purchased on the premises, but was purchased elsewhere (*cf.* R. 37). It cannot be therefore maintained that Section 33 of Title 27, United States Code, which reads in part as follows:

> "Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this chapter * * * is hereby declared to be a common nuisance."

is applicable since in no uncertain terms it is limited to cases where intoxicating liquor itself is sold or stored on the premises. Therefore, when Olivera entered the premises it cannot be said that the respondents herein were engaged pursuant to a conspiracy in maintaining a common nuisance in Room 604. Nor does Olivera's statement of a pre-arranged appointment aid in the showing of a commission of a conspiracy in the presence of the agents. It is not one of the overt acts set forth in the indictment (R. 25-28) and so far as the record shows the interview alleged there was never even commenced, no less consummated, by reason of the entry of the Special Agents almost immediately after Olivera's entrance.

At the time the respondents were arrested the conspiracy upon which the complaint was based had already been consummated. The agents did not, nor could they see conspiracy being committed. In this respect the case is on all fours with the *Go-Bart* decision. The government knew that there was no liquor on the premises. An effort was made to discover evidence which would sub-

stantiate and uphold the allegations set forth in the complaint before the Commissioner.

Consequently in total disregard of every inhibition placed upon the acts of the Government officials by history, by the Constitution and by the Courts, the Government Agents proceeded to make a most thorough and ransacking search of the premises. This Court cannot disregard the fact that the Special Agents themselves admit a search for evidence (R. 39), that Olivera had time to secure a search warrant but strangely enough failed to do so. Though the premises were small and limited in space, no possibility was left unexplored. The agents stopped at nothing. They asserted that a drawer of one of the desks was open and that the others were not locked (R. 38) but it is not necessary to constitue a rummaging and ransacking search that the government unlock a desk or other place where the document seized is kept. Such a proposition is totally at variance with common sense and ordinary principles of justice. A search is no less exploratory and no less abhorrent to constitutional principles because the government agents do not break down doors or unlock desks, safes or other places of storage. The principles here involved were erected as safeguards from ransacking of personal documents in indiscriminate fashion. It would be absurd to distinguish the case from the *Go-Bart* case as the Government attempts to do, (See brief in support of petition, p. 22) on this ground alone, for, as has hereinbefore been noted, in the *Go-Bart* case, not all of the property was taken from locked depositories.

What was done in the case at bar emphasizes the fact that it was "based solely with purpose to gain noth-

ing but information generally which may, perhaps, be proof that a crime has been committed." Chase, Circuit Judge in the majority opinion herein (R. 116).

That the arrest was but an excuse for a general exploratory search is emphasized by the fact that not only were two desks opened, ransacked and the papers they contained seized, but a towel cabinet was searched and papers in it seized. Waste-paper baskets were emptied and scraps of paper taken from them and later pasted together. The conclusion is inescapable that the special agents conducted a "fishing expedition" to determine what if anything they could find to incriminate the respondents herein. The deceptive manner in which the letter was obtained from the respondent Pauline Paris (R. 7, 40, 47-48) is but another *indicia* of this intent on the part of the special agents.

That the papers and documents seized herein are not instruments of crime is indicated by a comparison of the documents seized in the case at bar and those seized in *Go-Bart Importing Company* v. *United States, supra,* in *United States* v. *Kirschenblatt, supra,* and in *In re 191 Front Street, supra.*

In all of these cases the papers and documents were books of account, memoranda and other papers of a nature that inescapably connected them with the business alleged to have been carried on in the premises in which the seizure was made. Nevertheless, this Court did not hesitate to condemn the search and seizure in the *Go-Bart* case. It did not put its opinion upon the ground that these things might have been instrumentalities of crime or contraband, but by its condemnation of its search and seizure in that case this Court reiterated the proposition

that "a general exploratory search in the hope that evidence of crime might be found was unwarranted, illegal and contrary to all principles of justice." Nor do we concede that the seized papers and documents herein were instruments of crime. At best, they are but evidence of the fact that some crime may have been committed.

At the time of the seizure, the special agents knew no facts upon which they could base an opinion that the documents were instrumentalities of crime. If such a claim now is made, it is only because of some knowledge obtained after the search and seizure. Knowledge obtained after an unlawful search and seizure cannot be used to justify the search and seizure. *Byars* v. *United States*, 273 U. S. 28.

The argument of Judge Swan in his dissenting opinion (R. 118) that items 2, 3 and 4 and 10 (R. 46-47) were unrelated to the crime and therefore should be returned would, if carried to its logical conclusion, permit a general exploratory search, a sifting of evidence seized and an ultimate return of whatever the Government found useless. How totally at variance this proposition is with constitutional principles is apparent on its face.

The documents in the case at bar were seized under circumstances so similar to those under which the seizure was made in the *Go-Bart* case that its doctrine must apply. The test laid down in the *Marron* case that things "in the offender's immediate custody" are seizable is as inapplicable here as in the *Go-Bart* case.

While the respondents might have had knowledge as to where to find this or that paper that fact was equally

true in the *Go-Bart* case, but nevertheless the seizure was condemned.

The cases cited by the Government at page 23 of its brief do not support the right of agents to make an exploratory search. Thus in *Carroll* v. *United States,* 267 U. S. 132, 158, there was no rummaging or ransacking and the Court simply stated that where there is a legal arrest whatever is found in the control of the defendant "which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." There is a distinction between books and papers which are evidence of a crime and which in and of themselves are not illegally possessed and contraband where the *res* itself is illegitimately possessed. *United States* v. *Lee,* 274 U. S. 559, did not even involve a search. Mr. Justice Brandeis wrote as follows at page 563:

> "But no search on the high seas is shown. * * * It is not shown that there was any exploration below decks or under hatches."

Agnello v. *United States,* 269 U. S. 20, merely states that the fruits of a crime, weapons and things to effect an escape as well as things connected with the crime "as the means by which it was committed" may be seized. The books and documents herein are not the means by which the crime may have been committed, but merely evidence of the manner in which the Government claims a crime was committed.

CONCLUSION

There is no substantial conflict between *Marron* v. *United States*, 275 U. S. 192 and the decision of the Circuit Court of Appeals in the case at bar. The *Marron* case did not involve any rummaging or ransacking; what was there found was discovered in the execution of a search warrant for contraband and in good faith. There was no attempt made to explore the premises for incriminatory evidence under the guise of executing the search warrant.

The case at bar was properly treated by the Circuit Court of Appeals as an example of a general exploratory search for evidence under the guise of a search warrant incidental to an arrest. The Circuit Court of Appeals properly interpreted *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344. The limitations placed upon the right of search by arresting officers are not in doubt. These officials must refrain from indiscriminate rummaging and ransacking.

Wherefore it is respectfully prayed that the petition for a writ of *certiorari* herein should be denied.

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Attorney for Respondents.

MILTON B. SEASONWEIN,
On the Brief.

November, 1931.

TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	1
Statement	2

ARGUMENT.

The arrests, though lawful, did not justify a ransacking and exploratory search of the premises	6
Conclusion—The judgment of the Circuit Court of Appeals should be affirmed	27

TABLE OF CASES.

PAGE

Agnello v. United States, 269 U. S. 20.....7, 25
Boyd v. United States, 116 U. S. 616.....6, 7, 13-14, 16
Byars v. United States, 273 U. S. 28..... 24
Carroll v. United States, 267 U. S. 132.....7, 16, 25
Dillon v. O'Brien and Davis, 16 Cox C. C. 245.....24, 25
Federal Trade Commission v. American Tobacco Co., 264 U. S. 298.....7, 16, 17
Flagg v. United States, 233 F. 481.....7, 20
Go-Bart Importing Co. v. United States, 282 U. S. 344.....6, 7, 8, 9, 10, 11, 12, 13, 14, 22-23, 24, 26
Gouled v. United States, 255 U. S. 295.....6, 15
Hale v. Henkel, 201 U. S. 44.....7, 16
Haywood v. United States, 268 F. 795..... 7
In re 191 Front Street, 5 F. (2d) 282.....7, 16, 19, 23
Marron v. United States, 275 U. S. 192....6, 11, 12, 13, 26
McCulloch v. Maryland, 4 Wheat. 316..... 9
O'Connor v. United States, 281 F. 396..... 8
Olmstead v. United States, 277 U. S. 438..... 10
Silverthorne v. United States, 251 U. S. 385..... 6
United States v. Epstein, 33 F. (2d) 982..... 7
United States v. Kirschenblatt, 16 F. (2d) 202..... 7, 16, 17-18, 23
United States v. Kraus, 270 F. 578..... 7
United States v. Lee, 274 U. S. 559..... 25
United States v. Mills, 185 F. 318.....7, 19-20
United States v. Mounday, 208 F. 186.....7, 20-21
United States v. 1013 Crates, etc., 52 F. (2d) 49.....7, 19
United States v. Rembert, 284 F. 996.....7, 8, 26
United States v. Snyder, 278 F. 650..... 8
Village of Euclid v. Ambler Realty Co., 272 U. S. 365 10
Weeks v. United States, 232 U. S. 383.....6, 7, 17, 25
Wise v. Henkel, 220 U. S. 556..... 20
Wise v. Mills, 220 U. S. 549..... 20

STATUTES.

United States Code, Title 27, Sec. 33..... 21
United States Code, Title 27, Sec. 39..... 27
United States Code, Title 18, Sec. 612.....27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 466.

UNITED STATES OF AMERICA,

Petitioner,

vs.

DANIEL M. LEFKOWITZ and PAULINE PARIS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

Opinions Below.

The opinion of the District Court (R. 43) is reported in 47 F. (2d) 921. That of the Circuit Court of Appeals (R. 56) is reported in 52 F. (2d) 52.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered July 21, 1931 (R. 61). The petition for certiorari was filed October 16, 1931, and was granted November 30, 1931 (R. 62). Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement.

By an independent proceeding, initiated by an order to show cause (R. 2), signed and served before any indictment had been filed or a Commissioner's hearing had been had (R. 9, 11), respondents made an application in the United States District Court for the Southern District of New York for the suppression of evidence and the return of all books, papers, correspondence and records seized upon a search of room 604, 1547 Broadway, New York City (R. 2). Said room 604 was the office of "The Southern Agency," which was the trade name of the respondent Daniel M. Lefkowitz (R. 13). Respondent Pauline Paris, a stenographer, was an occupant of the office (R. 2).

The order to show cause was directed to the United States Attorney for the Southern District of New York (R. 2) and was supported by the affidavits of the respondents (R. 2-8). The United States Attorney for the Southern District of New York appeared in opposition to the order to show cause, submitting affidavits of a Deputy United States Marshal, of the Special Agents of the Department of Justice, Bureau of Prohibition, and of the Assistant United States Attorney in charge of the case (R. 9-36). As exhibits to the said affidavits a certified copy of the complaint before the Commissioner and the warrant of arrest issued thereon (R. 37-43) were filed, together with a copy of an indictment filed in the United States District Court for the Southern District of New York after the aforementioned order to show cause had been signed and served (R. 9). Said indictment named as defendants the respondents herein and one Herman Bernstein (R. 12-15).

All of the papers and articles seized at the time of the search and seizure were submitted to the District Judge by the United States Attorney (R. 44). Said papers and articles were not printed in the record, but were before the Circuit Court of Appeals in their original form pursuant to stipulation (R. 55).

The search and seizure followed the filing of a complaint before United States Commissioner Garrett W. Cotter (R. 37-42), who thereupon issued a warrant for the arrest of Henry Miller, "Jane Doe," "Richard Roe" and "John Doe" for an alleged violation of Section 37 U. S. C. C. (R. 42-43). The warrant was executed by a Deputy United States Marshal in the company of Special Agents of the Department of Justice, Bureau of Prohibition, on the afternoon of January 12, 1931 (R. 16). Of the persons named in the warrant only two were arrested and arraigned. The "Henry Miller" designated in the warrant was arraigned as Daniel Lefkowitz, and the "Jane Doe" named in the warrant was arraigned as Pauline Paris (R. 43).

At the time the order to show cause issued, the other persons referred to in the warrant had not been apprehended. One Benjamin Williams, who was not named in the warrant, but who was on the premises when the warrant was executed, was also taken into custody (R. 43). Williams subsequently testified before the Grand Jury, and was discharged upon motion of the Assistant United States Attorney (R. 11).

The arrests were made in a room 20 feet long and 10 feet wide. The office, divided by a partition, was fitted up with two desks and other articles of office furniture (R. 20, 23-24). Other than certain documents found on the person of respondent Lefkowitz (R. 10), all of the books, papers and articles seized were found in one or another of the pieces of furniture in the premises (R. 5, 24, 25, 35). The papers so seized were first kept in custody by the Special Agents, but after the service of the order to show cause were turned over to the Assistant United States Attorney, Ulysses S. Grant, upon whom due demand was made for their return, which said demand was refused (R. 7, 10).

Special Agent Olivera was the first to enter room 604 in 1547 Broadway. Lefkowitz and Williams were the only persons then in the room. Olivera remained at the entrance to the suite (R. 19). Immediately after his entry

into the premises he gave a prearranged signal to Special Agent Delmore (R. 32), who notified the other agents waiting on the floor below and within two minutes from the time Olivera entered the room the other agents joined him there (R. 17, 19, 23, 32).

As the agents entered, Lefkowitz was standing at the door of the inner office. He was identified as the Henry Miller in the warrant by Olivera and the Deputy United States Marshal placed him under arrest, at which time he gave his name as Daniel Lefkowitz (R. 17). No copy of the warrant was given to Lefkowitz at this time or at any other time (R. 6).

Following the arrest, Special Agent Delmore searched the person of Lefkowitz and took therefrom and turned over to the Deputy United States Marshall certain papers and articles. After the arrest these were turned over to Assistant United States Attorney Grant (R. 10, 17, 20, 25, 32-33).

The search of Lefkowitz's person concluded, the Special Agents conducted an exploratory investigation throughout the premises, indiscriminately seizing papers, documents and records from all of the articles of furniture therein contained (R. 20, 23, 25). During the progress of the search of the outer office, respondent Pauline Paris entered and was placed under arrest (R. 17, 19, 20).

Not only were the desks in the office ransacked (R. 5-6, 20, 23-25, 35), but the agents rummaged through a towel cabinet and waste paper baskets (R. 35), taking every scrap of documentary evidence, including even raffle books belonging to respondent Paris (R. 3). In order to obtain evidence of the signature and typewriting of respondent Paris, she was directed to type a letter to the Assistant United States Attorney (R. 3, 21, 24-25). This is further illustration of the exploratory nature of the search.

Although many documents and other records were seized, no receipt of any kind whatsoever was given to the respondents upon the conclusion of the search and seizure (R. 6). Nor was a copy of the warrant of arrest given to respondents (R. 6). Save for a small bottle of

alcohol found in the desk in the inner office (R. 35) no liquor was found in any of the office furniture. A pint bottle of whiskey, taken from the person of Williams, who occupied an office elsewhere in the building (R. 23, 34), had been brought into the premises by him just before Special Agent Olivera arrived (R. 19).

The entire search and seizure was conducted by the Special Agents under the color of their authority and with threats of force (R. 3, 5) over the protest and objection and without the consent, authorization or acquiescence of respondents (R. 6, 7, 46).

Despite the fact that the Special Agents had visited the premises a number of times before the search and seizure (R. 29, 30, 31, 40), and had had ample opportunity to observe whether any contraband liquor was kept within these two small offices, no application for a search warrant was made (R. 20). Upon the arraignment the Commissioner condemned the unlimited and rummaging search for documentary evidence (R. 6). The Special Agents justified their conduct as the incident to a lawful arrest, frankly admitting a search for evidence of criminality (R. 20).

Upon the completion of the search and seizure, respondents were arraigned before a United States Commissioner and released on bail pending a hearing (R. 21). Before that hearing the respondents made the application to suppress, etc.

Following an oral argument, the application to suppress, etc., was denied by the District Court (R. 47), which rendered a written opinion (R. 43). Upon appeal, the order of the District Court was reversed by the Circuit Court of Appeals as to all the property seized, except that taken from the person of the respondent Lefkowitz and the letter written by the respondent Paris, on the ground that the search and seizure were unreasonable (R. 56). Circuit Judge Swan, dissenting, expressed the view that the seizure was lawful except as to certain items which appeared to have no relation to the crime with which Lefkowitz was charged (R. 60). This Court granted a writ of certiorari to review the judgment of the Circuit Court of Appeals (R. 62).

ARGUMENT.

The arrests, though lawful, did not justify a ransacking and exploratory search of the premises.

Lawless enforcement of the law by the duly constituted authorities by means of unreasonable searches and seizures is a proposition which this Court has always severely criticized and discountenanced (*Weeks* v. *United States,* 232 U. S. 383; *Silverthorne* v. *United States,* 251 U. S. 385).

In *Silverthorne* v. *United States, supra,* the Court said:

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

This Court has repeatedly refused to lend the weight of its authority and give the stamp of its approval to general exploratory searches for evidence. Such searches have been deemed violative not only of the protection afforded against unreasonable searches and seizures by the Fourth Amendment, but also as violative of the guaranty against compulsory self-incrimination embodied in the Fifth Amendment (*Boyd* v. *United States,* 116 U. S. 616; *Gouled* v. *United States,* 255 U. S. 295; *Marron* v. *United States,* 275 U. S. 192).

While the respondents were lawfully taken into custody under the color of a warrant for their arrest (R. 42-43), nevertheless such a circumstance is no basis in fact or in law for a thorough-going ransacking and rummaging of the premises in which the arrest takes place (*Go-Bart Importing Co.* v. *United States,* 282 U. S. 344).

Boyd v. *United States*, 116 U. S. 616, first enunciated the rule that a wholesale seizure of documents constituted an unreasonable search and seizure. In succeeding decisions this Court has repeatedly reaffirmed this principle (*Weeks* v. *United States*, 232 U. S. 383; *Gouled* v. *United States*, 255 U. S. 398; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298; *Agnello* v. *United States*, 269 U. S. 20; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *Cf. Hale* v. *Henkel*, 201 U. S. 44).

These principles have been vigorously enforced in the Circuit Court of Appeals and in the District Courts (*Flagg* v. *United States*, 233 F. 481 [C. C. A., 2d]; *In re 191 Front Street*, 5 F. [2d] 282 [C. C. A., 2d]; *United States* v. *Kirschenblatt*, 16 F. [2d] 202 [C. C. A., 2d]; *United States* v. *1013 Crates, etc.*, 52 F. [2d] 49 [C. C. A., 2d]; *United States* v. *Mills* [D. C., N. Y.], 185 F. 318; *United States* v. *Mounday* [D.C., Kan.], 208 F. 186; *United States* v. *Epstein* [D. C., N. Y.], 33 F. [2d] 982; *United States* v. *Kraus* [D. C., N. Y., 1921], 270 F. 578; *United States* v. *Rembert* [D. C., Tex., 1924], 284 F. 996). See also *Haywood* v. *United States*, 268 F. 795, 803 (C. C. A., 7th, 1920).

These cases involve in one way or another the limit of a search of the premises where a lawful arrest took place. Uniformly they condemn the practice of general exploratory searches for evidence of criminality.

All of these cases involve an interpretation of the Fourth Amendment to the Constitution of the United States. It provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Two separate and distinct prohibitions are contained in the amendment. It prohibits unreasonable searches and

seizures of any kind or character, however made. It interdicts, secondly, the issuance of search warrants except where probable cause exists and where the search warrant is upon oath or affirmation and contains a particular description of the place to be searched and the persons or things to be seized. This has been the uniform construction of the Fourth Amendment by this Court in all cases that have arisen under it. The most recent enunciation of this interpretation is to be found in *Go-Bart Importing Co.* v. *United States, supra,* at pages 356 to 357. The amendment has also been so interpreted in the lower Federal Courts. Of these cases, *United States* v. *Snyder* (D. C., W. Va., 1922), 278 F. 650, 652; *O'Connor* v. *United States* (D. C., N. J., 1922), 281 F. 396, 397; *United States* v. *Rembert, supra,* are examples.

Go-Bart Importing Co. v. *United States, supra,* involved the scope of a search and seizure of premises similar to those in the case at bar as an incident to a lawful arrest and without a search warrant. This Court, in the course of its opinion, condemning the search and seizure as unreasonable, in no uncertain language interpreted the Fourth Amendment to cover an unlawful search and seizure made as an incident to a lawful arrest. Mr. Justice Butler wrote as follows at pages 356 to 357 of 282 U. S.:

> "The first clause of the Fourth Amendment declares:
>
> > 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken. Gouled v. United States, 255 U. S. 298, 307, 41 S. Ct. 261, 65 L. Ed. 647. The second clause declares: 'And no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'
>
> This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. Agnello v. United States, 269 U. S. 20, 33. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement less there shall be impairment of the rights for the protection of which it was adopted. Boyd v. United States, 116 U. S. 616, 623. Weeks v. United States, supra, 389-92."

That the Fourth Amendment was directed against the evil of the writs of assistance and general search warrants, which had been so vehemently contested prior to the Revolution, is a fact too well known to need more than passing reference. The historical background has been lucidly set forth in the opinion of Mr. Justice Bradley in *Boyd* v. *United States, supra.* To prevent the repetition of the general and exploratory searches for evidence of criminality which had been perpetrated under the protection of those devices, to prevent the unlimited seizure of a man's papers and property was the guiding principle of that amendment. "We must never forget," said Mr. Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 407, "that it is a Constitution we are expounding." To delimit the constitutional protection against unreasonable searches and seizures to those made under the guise of a search warrant, as is contended by the Solicitor General in the brief for the United States (pp. 37-40); is to emasculate the amendment and to strip it of its efficacy. So interpreted, the amendment would be reduced to a form of words and it could be evaded as the occasion arose for evasion.

Although the framers of the Constitution may never have had searches incidental to a lawful arrest specifically in their minds at the time the Fourth Amendment was made a part of the Constitution, nevertheless it cannot be argued from that fact that such searches are not covered by the Fourth Amendment. This Court has always interpreted the Constitution as a living document, intended to meet modern conditions (*Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387). See also the dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States*, 277 U. S. 438, 471. It is argued that the search incidental to a lawful arrest is totally different from the type of search aimed at by the Fourth Amendment because the entry of the officers in such a case is lawful, whereas when the entry is made by virtue of an invalid search warrant, it is unlawful. However the argument may be phrased, it needs only a reference to the *Go-Bart* case to show that it is fallacious. In that case this Court expressly assumed that the arrests had been lawfully made, but nevertheless this Court held the search and seizure to have been unreasonable. The situation is precisely the same in the case at bar.

Go-Bart Importing Co. v. *United States*, 282 U. S. 344, is the most recent application of the doctrine by this Court to a case involving a search made as an incident to an arrest. Bartels, the secretary and treasurer of the corporation, was in the company's office in New York City when the Special Agents arrested him. His person was searched. Gowen, the president of the company, subsequently entered the office and was arrested and searched. Keys were found on his person, and the Special Agents directed him to open a desk and the safe in the office from which papers were taken. From other parts of the office, papers, journals, account books, letter files, insurance policies, canceled checks and index cards were taken. The Government claimed that Gowen and Bartels sold intoxicating liquors and that at the company's office they exhibited and took orders for intoxicating liquors, some

of which were delivered there and some of which was delivered elsewhere. The office of the Go-Bart Importing Co. consisted of a suite of three rooms. Approximately a dozen bottles of assorted intoxicating liquors were found on the premises in addition to the papers and documents. No search warrant had issued and this Court considered the warrant of arrest as insufficient on its face, but assumed, as the lower courts had held, that the arrests were lawful and valid. In discussing the validity of the search and seizure, Mr. Justice Pierce Butler, referring to the search and seizure, stated (282 U. S., at 358):

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. * * * Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306."

Marron v. *United States*, 275 U. S. 192, is the only case decided by this Court which may in any way support the principles urged by the Government. That case, however, is not contrary to the decision in *Go-Bart Importing Co.* v. *United States*. There was no general exploratory search such as occurred in the *Go-Bart* case or in the case at bar. Prohibition officers having a search warrant entered a speakeasy and arrested one Birdsall, who was in charge of the place. Marron was not then present. The agent

searched for and found large quantities of liquor. In the course of the search they came upon a grey ledger in a closet on the premises. Beside the cash register they found a number of bills for electric light, gas, water and telephone service furnished on the premises. They seized the grey ledger and the bills. Marron petitioned for the suppression of this evidence. His petition was denied, and the evidence was admitted upon the trial over his objection and exception. Marron was convicted. The case came before this Court on a writ of certiorari. This Court held that the seizure of the grey ledger and the bills was not authorized by the search warrant (275 U. S. 192, 198). It was held, however, that as an incident to the lawful arrest that the agents could contemporaneously search the premises "in order to find and seize the things used to carry on the criminal enterprise * * *." This Court held that the grey ledger was part of the equipment actually used to commit the offense of maintaining a nuisance and that it was in the "immediate possession and control" of Birdsall. Mr. Justice Butler said at page 199:

> "The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose."

By this language this Court did not mean to sanction general exploratory searches for evidence, as is apparent from the language in which Mr. Justice Butler distinguishes the *Marron* case from the *Go-Bart* case. He states at page 358 of 282 U. S. as follows:

> "Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident of the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside

the cash register. These things were visible and accessible and in the offender's immediate custody. *There was no threat of force or general search or rummaging of the place.*" (Italics ours.)

The absence of a general exploratory search was emphasized by the Attorney General of the United States in his brief in opposing the petition for a writ of certiorari in the *Marron* case. At pages 11 to 12 in that brief, *United States* v. *Kirschenblatt, supra,* was distinguished in the following manner:

> "* * * but the record in that case showed that to disclose the incriminating documents the officers ransacked the premises in a high-handed way, not to discover contraband articles described in the warrant but merely to obtain incriminating documents, and it was for this reason that the United States made no application for *certiorari* to review that decision.
>
> There was in the instant case no rummaging among defendant's papers for incriminating evidence.
>
> * * * They had no warrant for the seizure of papers, nor was any general search made therefor. The documents seized were incidentally discovered while the officers were searching for liquor."

The sharp criticism by this Court of the outrageous nature of the search and seizure in the *Go-Bart* case is indicative of the fact that this Court has not departed from the principles which first found expression in *Boyd* v. *United States.* In that case this Court held unconstitutional a statute which required a defendant to produce in court his private papers, invoices and books in a forfeiture proceeding, and for failure so to do, to have the allegations in the libel taken as confessed. Mr. Justice Bradley thoroughly examined the historical background underlying unreasonable searches and seizures, and wrote as follows:

> "The search and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different

> things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained or of using them as evidence against him. The two things differ *toto cœlo*. In the one case the government is entitled to the possession of the property; in the other it is not * * *. By the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property. * * *
>
> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense. It is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other."

As was said by Judge Chase in the majority opinion of the Circuit Court of Appeals for the Second Circuit in the case at bar, the *Go-Bart* case is controlling here. Judge Chase wrote as follows (R. 58-59):

> "One of these, and the only one we need to mention now, is the firmly rooted proposition that what are called general exploratory searches throughout premises and personal property are forbidden. It does not matter whether the premises are comparatively large or small, whether the articles of personal property opened and the contents examined are numerous or few, the right of personal security, liberty and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. The legal principles which protect all men equally loom as large at one time as at another, and forbid the

search and seizure. Such a search and seizure as these officers indulged themselves in is not like that in *Marron* v. *United States*, 275 U. S. 192, 488 S. Ct. 74, 72 L. Ed. 231, where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made. The decision that does control is *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. Indeed this case differs in its essential facts from that one so slightly that what is said in that opinion characterizing the search made will apply with equal force to this one, which must accordingly be held unreasonable."

It is argued by the Solicitor General (pp. 39-40) that there is a distinction between a search authorized by a search warrant and a search authorized by a lawful arrest and the Court below failed to recognize this distinction. Such a distinction does not in fact exist. General exploratory searches for evidence have always been condemned by this Court, whether they are incidents of a lawful arrest or pursuant to a search warrant. *Gouled* v. *United States, supra,* is an example of this assimilation of doctrine. In that case certain papers were seized under a search warrant. Mr. Justice Clarke wrote as follows, at page 309 of 255 U. S.:

"Although search warrants have thus been used in many cases ever since the adoption of the constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless, it is clear, at common law, and as the result of the *Boyd* and *Weeks* cases, *supra,* they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but they may be resorted to only when a primary right to such search and seizure may be found in the interests which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders a possession of the property by the accused unlawful and provides that it may be taken."

In the case at bar the officers had ample time to obtain a search warrant if their real purpose was to search for contraband. The officers had probable cause to make an arrest and obtained a warrant of arrest. They would not have been impeded in the performance of their duties if at the same time that they obtained the warrant of arrest they had obtained a search warrant. This Court has held that, wherever possible, a search warrant and a warrant of arrest should be employed by the arresting officers. See *Carroll* v. *United States, supra.* This was not done in the case at bar because the officers knew that they could not obtain a search warrant for the evidentiary material which they sought. See *Kirvin* v. *United States, supra,* and *United States* v. *Kirschenblatt, supra.* This is further illustration of the unreasonableness of the search and seizure in the case at bar.

General exploratory searches for evidence are within the proscription of the Fourth Amendment even where there is not an actual physical rummaging of the premises. *Hale* v. *Henkel,* 201 U. S. 44; *Boyd* v. *United States,* 116 U. S. 616. In *Hale* v. *Henkel,* it was held that a subpoena *duces tecum* which was too broad in its scope would be construed to constitute an unreasonable search and seizure, contrary to the Fourth Amendment. Upon analogous principles, this Court restricted the power of the Federal Trade Commission to compel the production of records for inspection and making copies. *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298. Writing for a unanimous bench, Mr. Justice Holmes declared (264 U. S., at 305, 306):

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions in the fire (*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 479, 14 Sup. Ct. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."

* * * * * * *

> "It is contrary to the first principles of justice to allow a search through all of the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 29 Sup. Ct. 115, and as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335."

Weeks v. *United States*, 232 U. S. 383, is another illustration of the application of the rule. There, the search and seizure had been made without the authority of a search warrant. The defendant had previously been arrested without a warrant by State police officers, who thereupon went to his home and searched the premises, turning over papers seized to the United States Marshal. A second search was made the same day by the United States Marshal in the company of the police officers. This Court held that this wholesale seizure of papers was so unreasonable that, if upheld, it would render the protection of the Fourth Amendment of no value.

With the same principles in mind as to the limitations upon the scope of a search and seizure upon a lawful arrest, the Circuit Court of Appeals for the Second Circuit held a search and seizure of documents under circumstances similar to those in the case at bar to be illegal in *United States* v. *Kirschenblatt*, 16 F. (2d) 202.

In that case the special agent, with a search warrant for a general search of the premises, went to the defendant's offices, arrested him and made a thorough search thereof. A small amount of liquor and a large quantity of papers, including account books, customers' lists and letters, were seized. Holding that the search warrant and the arrest were legal, the Circuit Court of Appeals stated that the only question was that as to the scope of the search under the warrant or as an incident to the arrest.

Judge Learned Hand wrote as follows, at page 203 of 16 F. (2d):

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will

convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which they makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition."

He concluded as follows at page 204:

"It is seldom that one finds a document containing evidence of crime which was not at one time used in its commission; the papers important in any prosecution are ordinarily either communications passing between the actors or records necessary to keep track of the details. These are all that the prosecution requires, and all that, except in rare instances, it will ever get. They cannot be reached, except by a thorough search of all that the offender has, to allow which would be to countenance exactly what the amendment was designed to prevent. Therefore, while we agreed that it is no answer to a search to say that papers have been seized, we cannot agree that the power extends beyond those which are a part of the forbidden act itself. It would be hazardous to attempt any definition; we shall not.

The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all these may be contraband and subject to seizure when found on the premises. *But the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon such search warrant.*" (Italics ours.)

In an earlier case the Circuit Court of Appeals for the Second Circuit held that a search warrant directing the seizure of "any books, papers, records or documents pertaining to the sale, possession or transportation of intoxicating liquors" was improvidently issued and that the said search warrant must be quashed and everything seized thereunder returned, and the evidence suppressed (*In re 191 Front Street,* 5 F. [2d] 282). The records and documents seized in that case included books, papers and records consisting of memoranda, telegrams, invoices, receipts and various letters. It was held that these papers and documents were not instruments of crime, but merely some evidence of crime, and could not be seized as an incident to the arrest since "the distinction has been recognized between what one carries about on his person and what one keeps in his house."

Nor are exploratory searches countenanced merely because the fruits thereof are contraband (*United States* v. *1013 Crates, etc.,* 52 F. [2d] 49 [C. C. A., 2d]). There admittedly contraband property had been seized without a search warrant; the agents sought to justify it as incident to a lawful arrest. Condemning the search, Circuit Judge Chase wrote as follows:

> "They [searches] are unreasonable, and because so, unlawful when the arrest may fairly be said to have been but an excuse for a general exploratory search. Such searches are uniformly without the law whether conducted under the pretended authority of a search warrant or in the guise of a mere incident of a lawful arrest. *Go-Bart Co.* v. *United States,* 282 U. S. 344. * * * No period of freedom from such an evil, however long it may be, should lull us into a false sense of security and lead us to permit this always necessary safeguard of liberty to be weakened in exchange for the temporary advantage of more thorough or certain enforcement of some law, however beneficial."

In *United States* v. *Mills* (D. C., N. Y., 1911), 185 F. 318, a decision antedating the *Weeks* case by three years, the defendants had been lawfully arrested for a conspiracy

to violate the Customs Law. At the time of their arrest the United States Marshal searched for, seized and removed from the premises a quantity of documents concerning the alleged fraudulent importation and all other business of defendants. Subsequently these papers came into the possession of the United States Attorney. Upon petition, the return of all seized papers was directed, Lacombe, D. J., holding that such a comprehensive seizure of documentary evidence in the premises where an arrest is made constituted an unreasonable search and seizure in violation of the Fourth and Fifth Amendments. The subsequent history of the case is illuminating. It came to this Court upon a writ of error and this Court dismissed the writ for lack of jurisdiction (*Wise* v. *Mills*, 220 U. S. 549 [1911]; see also *Wise* v. *Henkel*, 220 U. S. 556 [1911]). In its decision this Court intimated that were the case properly before the Court, it would affirm the order below, because the search and seizure was unreasonable. Thereafter a writ of error was dismissed by the Circuit Court of Appeals of the Second Circuit for the reason that the order was interlocutory, but that Court also stated that it did not approve of unlimited exploratory searches (189 F. 583).

Flagg v. *United States*, 233 F. 481, also involves the scope of a search and seizure upon an arrest. There, too, after the arrest of the defendant a wholesale search and seizure was made of all the books and papers in the premises where the arrest was made. There, too, no search warrant authorized the seizure and the Circuit Court of Appeals for the Second Circuit held that "the constitutional rights of the defendants were violated by the unlawful seizure of his books and papers by the officers and agents of the United States, acting without warrant or pretense of legal authority."

A further illustration is to be found in *United States* v. *Mounday*, 208 F. 186. After arresting the defendants under a warrant for violations of the Postal Laws, a search was made of the office in which the arrest was made and

a large volume of letters, writings and documents were carted away. No search warrant there authorized the wholesale and indiscriminate seizure of these books and papers. The District Court held that there was no right of any kind or nature to justify such a search and seizure and that it involved a "flagrant violation of defendant's conceded constitutional rights" and that the fruits of the unreasonable search and seizure must therefore be suppressed.

In the case at bar the special agents made a most thorough and ransacking search of the premises at 1547 Broadway. From an examination of the very affidavits with which the Government sought to oppose the application in the District Court, there is a clear indication that no portion of the premises was overlooked in the Government's anxious search for incriminatory evidence. Even Special Agent Olivera, who claimed to have been on the premises prior to the date of the arrest and search and seizure, could not, in his affidavit, nor in his complaint, state that liquor was stored on the premises in any manner whatsoever. The discovery of a small bottle of alcohol is insignificant, since this Court can take judicial notice of the fact that this substance is very useful in the proper care of typewriters. The liquor found on the person of Williams was not purchased on the premises, but was purchased elsewhere, and it cannot be therefore maintained that Section 33 of Title 27, United States Code, which reads, in part, as follows:

> "Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this chapter * * * is hereby declared to be a common nuisance,"

is applicable, since in no uncertain terms it is limited to cases where intoxicating liquor itself is sold or stored on the premises. Therefore, when Olivera entered the premises it cannot be said that the respondents herein were engaged pursuant to a conspiracy in maintaining a com-

mon nuisance in room 604. Nor does Olivera's statement of a pre-arranged appointment aid in the showing of a commission of a conspiracy in the presence of the agents. It is not one of the overt acts set forth in the indictment, and so far as the record shows, the interview alleged there was never even commenced, no less consummated, by reason of the entry of the special agents almost immediately after Olivera's entrance.

At the time the respondents were arrested the conspiracy upon which the complaint was based had already been consummated. The agents did not, nor could they see conspiracy being committed. In this respect the case is on all fours with the *Go-Bart* decision. The Government knew that there was no liquor on the premises. An effort was made to discover evidence which would substantiate and uphold the allegations set forth in the complaint before the Commissioner.

Consequently, in total disregard of every inhibition placed upon the acts of the Government officials by history, by the Constitution and by the Courts, the Government agents proceeded to make a most thorough and ransacking search of the premises. This Court cannot disregard the fact that the special agents themselves admit a search for evidence, that Olivera had time to secure a search warrant, but, strangely enough, failed to do so. Though the premises were small and limited in space, no possibility was left unexplored. The agents stopped at nothing. They asserted that a drawer of one of the desks was open and that the others were not locked (R. 20), but it is not necessary to constitute a rummaging and ransacking search that the Government unlock a desk or other place where the document seized is kept. Such a proposition is totally at variance with common sense and ordinary principles of justice. A search is no less exploratory and no less abhorrent to constitutional principles because the Government agents do not break down doors or unlock desks, safes or other places of storage. The principles here involved were erected as safeguards from ransacking of personal documents in indiscriminate fashion. The *Go-*

Bart case is not distinguishable on this ground alone, for, as has hereinbefore been noted, in the *Go-Bart* case not all of the property was taken from locked depositories.

What was done in the case at bar emphasizes the fact that it was "based solely with purpose to gain nothing but information generally which may, perhaps, be proof that a crime has been committed" (Chase, C. J., in the majority opinion herein).

That the arrest was but an excuse for a general exploratory search is emphasized by the fact that not only were two desks opened, ransacked, and the papers they contained seized, but a towel cabinet was searched and papers in it seized. Waste-paper baskets were emptied and scraps of paper taken from them and later pasted together. The conclusion is inescapable that the special agents conducted a "fishing expedition" to determine what, if anything, they could find to incriminate the respondents herein. The deceptive manner in which the letter was obtained from the respondent Pauline Paris is but another *indicia* of this intent on the part of the special agents.

That the papers and documents seized herein are not instruments of crime is indicated by a comparison of the documents seized in the case at bar and those seized in *Go-Bart Importing Co.* v. *United States, supra,* in *United States* v. *Kirschenblatt, supra,* and in *In re 191 Front Street, supra.*

In all of these cases the papers and documents were books of account, memoranda and other papers of a nature that inescapably connected them with the business alleged to have been carried on in the premises in which the seizure was made. Nevertheless, this Court did not hesitate to condemn the search and seizure in the *Go-Bart* case. It did not put its opinion upon the ground that these things might have been instrumentalities of crime or contraband, but by its condemnation of its search and seizure in that case this Court reiterated the proposition that "a general exploratory search in the hope that evidence of crime might be found was unwarranted, illegal

and contrary to all principles of justice." Nor do we concede that the seized papers and documents herein were instruments of crime. At best, they are but evidence of the fact that some crime may have been committed.

At the time of the seizure, the special agents knew no facts upon which they could base an opinion that the documents were instrumentalities of crime. If such a claim now is made, it is only because of some knowledge obtained after the search and seizure. Knowledge obtained after an unlawful search and seizure cannot be used to justify the search and seizure (*Byars* v. *United States*, 273 U. S. 28).

The argument of Judge Swan in his dissenting opinion that items 2, 3 and 4 and 10 were unrelated to the crime and therefore should be returned would, if carried to its logical conclusion, permit a general exploratory search, a sifting of evidence seized and an ultimate return of whatever the Government found useless. How totally at variance this proposition is with constitutional principles is apparent on its face.

The documents in the case at bar were seized under circumstances so similar to those under which the seizure was made in the *Go-Bart* case that its doctrine must apply. The test laid down in the *Marron* case that things "in the offender's immediate custody" are seizable is as inapplicable here as in the *Go-Bart* case.

While the respondents might have had knowledge as to where to find this or that paper, that fact was equally true in the *Go-Bart* case, but nevertheless the seizure was condemned.

Much reliance is placed by the Government upon the case of *Dillon* v. *O'Brien and Davis*, 16 Cox C. C. (Ex. Div., Ire.) 245 (Brief of United States, pp. 21-24). When the facts in that case are closely analyzed, a total disparity will be noted between them and those in the case at bar. There, the papers seized were actually being used at the time the arrest was made. There was no rummaging and ransacking. The books and papers taken were on a desk in the hands of the man arrested in the *O'Brien*

case, and consequently might be said to have been on his person. Whatever general language was used in the case must therefore be limited to its actual facts.

It is also stated that this Court has approved *Dillon* v. *O'Brien and Davis, supra*, in *Weeks* v. *United States, supra* (Brief, p. 25). But when the language quoted from the *Weeks* case is examined, it will be seen that this Court cited *Dillon* v. *O'Brien and Davis* only for the proposition that the person of the accused might be searched upon his arrest.

The Government cites at pages 25 to 27 of its brief, *Carroll* v. *United States*, 267 U. S. 132, 158; *Agnello* v. *United States*, 269 U. S. 20, and *United States v. Lee*, 274 U. S. 559, 563. These cases do not sustain the right of agents to make an exploratory search for evidence.

Thus, in *Carroll* v. *United States*, 267 U. S. 132, 158, there was no rummaging or ransacking and the Court simply stated that where there is a legal arrest, whatever is found in the control of the defendant "which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." There is a distinction between books and papers which are evidences of a crime and which in and of themselves are not illegally possessed, and contraband where the *res* itself is illegitimately possessed.

United States v. *Lee*, 274 U. S. 559, did not even involve a search. Mr. Justice Brandeis wrote as follows, at page 563:

> "But no search on the high seas is shown. * * * It is not shown that there was any exploration below decks or under hatches."

Agnello v. *United States*, 269 U. S. 20, merely states that the fruits of a crime, weapons and things to effect an escape as well as things connected with the crime, "as the means by which it was committed," may be seized. The books and documents herein are not the means by which the crime may have been committed, but merely evidence of the manner in which the Government claims a crime was committed.

Attempt is made to distinguish the *Go-Bart Importing Co.* v. *United States, supra,* from the instant case (Brief for the United States, pp. 32-35). But the distinction pointed out is without any difference. That one of the respondents had an appointment with Special Agent Olivera merely shows the pretext used to obtain entry to the premises. It does not mean that the crime was actually in progress, because before any discussion was had the arrests were made. That the agents had recent knowledge of the existence of the conspiracy to violate Title 27 of the United States Code only strengthens their position as to the existence of probable cause and has no other effect.

It is further urged that no fraudulent claims were made, that no force was used and that no desks were unlocked. But the search was made under the pressure of the official authority of the officials. This amounted to coercion (*United States* v. *Rembert, supra*). Force was used, although the agents deny it. Finally, the breaking into of locked depositories is matter of aggravation of the unreasonableness. The lack thereof does not indicate a reasonable search.

While in the *Go-Bart* case no warrant of arrest existed, the arrests were assumed to be valid.

For these reasons we deem the *Go-Bart* case controlling on the facts herein, and that the search herein was an unreasonable one.

There is no substantial conflict between *Marron* v. *United States,* 275 U. S. 192, and the decision of the Circuit Court of Appeals in the case at bar. The *Marron* case did not involve any rummaging or ransacking; what was there found was discovered in the execution of a search warrant for contraband and in good faith. There was no attempt made to explore the premises for incriminatory evidence under the guise of executing the search warrant.

The rule that a search may be made as an incident to a lawful arrest is and must be subjected to the limitation that the arresting officers must refrain from rummaging and ransacking without pretense of right. They must not

search for evidentiary material when they have no probable cause to believe that contraband is on the premises. Where there is a sale of contraband immediately before the arrest, and a search warrant cannot be obtained with due diligence, then, perhaps, a search without a warrant may be made. That is not the case at bar, however. The lack of this factor is emphasized by the fact that while the officers had time to get a warrant of arrest, they did not obtain a search warrant. Had they possessed the requisite probable cause for such a search warrant, one could have been issued under Title 27, Section 39, United States Code, or under the Search Warrant Act (Title 18, Sec. 612 *et seq.*, U. S. Code). It is therefore apparent that the arresting officers went on a fishing expedition for evidence after they had made the arrests. This is plainly unreasonable and unlawful. Nor will the limitations placed upon arresting officers by the Circuit Court of Appeals affect searches for contraband, for under the statutes already mentioned a search warrant can be obtained to search for and seize contraband.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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MILTON B. SEASONWEIN,
with him on the brief.

February, 1932.

SUPREME COURT OF THE UNITED STATES.

No. 466.—October Term, 1931.

United States of America, Petitioner, vs. Daniel M. Lefkowitz and Pauline Paris. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 11, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

The question is whether searches and seizures claimed by the Government to have been made as lawfully incident to the arrest of respondents on a warrant for conspiracy to violate the National Prohibition Act transgressed their rights under the Fourth and Fifth Amendments.

January 12, 1931, a prohibition agent complained to a United States commissioner in the southern district of New York that commencing June 21, 1930, and continuing to the time of making the complaint Henry Miller (meaning respondent Lefkowitz) Jane Doe (meaning respondent Paris) and another person called Richard Roe did conspire to sell, possess, transport, furnish, deliver and take orders for intoxicating liquor contrary to the National Prohibition Act. The complaint alleged it was a part of the conspiracy that from room 604 at 1547 Broadway defendants should solicit orders for liquor, have it delivered by express companies or other carriers, collect for it and share the proceeds. It alleged certain overt acts but they have no significance upon the question under consideration. The allegations of the complaint show that the complaining witness had knowledge and information of facts amply sufficient to justify the accusation.

The commissioner issued his warrant, to which was attached a copy of the complaint, commanding the marshal and his deputies to arrest defendants. It was given to a deputy marshal for execution and he, the complaining witness and three other prohibition agents, went to room 604. The room was about ten feet wide and twenty feet long and was divided by a partition. In its outer portion, there were a stenographer's desk used by respondent Paris, a towel cabinet and a waste basket and in the inner part

another desk and basket. When the deputy marshal and agents entered, Lefkowitz was in the room. The deputy marshal arrested him, and thereupon one of the prohibition agents searched and took from his person various papers and other things all of which were given to the deputy marshal and later turned over to the assistant United States attorney. The agents opened all the drawers of both desks, examined their contents, took therefrom and carried away books, papers and other articles.[1] They also

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[1]From the outer desk were taken:

1. Black leather covered loose-leaf note book, containing alphabetical list of names and addresses.

2. An envelope marked room 604, 1547 Broadway, New York City, containing a 1929 New York State motor vehicle registration certificate 5 Y-2555, issued to Milton Hordish, 635 Kelly Street, Bronx, N. Y., for a 1929 Nash sedan.

3. A bill or statement amounting to $25 addressed to Herman Bernstein, c/o Bernstein & Lefkowitz, 1547 Broadway, New York City, apparently sent by doctors whose names appear on the statement.

4. Business card bearing the name of Dave Scherl, giving his address and telephone number and residence telephone number.

5. A number of business cards reading as follows:

Dan Lefkowitz — Herman Bernstein
LEFKOWITZ & BERNSTEIN
1547 Broadway
New York City
Chickering 4-8928 — Room 604

6. About 25 sheets of typewriter paper with the heading thereon of "William Salmon, 1547 Broadway, room 604."

7. About 75 envelopes addressed to various persons throughout the United States, some of which contained undated letters bearing the typewritten signature "William Salmon" to the effect that he had made his yearly change of name from "Henry Miller" to "William Salmon" and that he had received a new stock of merchandise that was for sale.

8. A cardboard covered loose-leaf binder, containing an alphabetical typewritten list of names and addresses.

9. A stenographer's note book and text book.

10. Three raffle books.

From the inner desk were taken:

1. Bottle partly full of alcohol (not shown to be intended or fit for beverage).

2. Telephone address book containing names of persons and telephone numbers.

3. Business card.

4. Blank order book with some of the slips torn out.

5. Several business cards of Bernstein & Lefkowitz.

searched the towel cabinet and took papers from it.[2] There was no breaking as the desks and cabinet were not locked. They also took the contents of the baskets and later pasted together pieces of papers found therein.[3] Respondent Paris came in while the room was being searched, and the deputy marshal arrested her. All the searches and seizures were made without a search warrant. The prohibition agents delivered to the special agent in charge all the things taken from the desks, cabinet and baskets. And, until delivered to the assistant United States attorney after Lefkowitz applied to the court for their suppression and return, they were held by the agent in charge for use in making further investigations concerning the conspiracy referred to in the complaint.

January 21, 1931, the district court on the application of Lefkowitz issued an order to show cause, why the court should not make an order for the suppression of evidence obtained by reason of the search of the room and for the return of all the books, papers and other things belonging to Lefkowitz. With the exception of some things that the prosecuting attorney did not wish to retain as evidence and which he had returned to Lefkowitz before the

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[2]Several typewritten loose leaf sheets unbound bearing names and addresses of numerous people throughout the United States.

[3]The writings made by pasting together pieces of paper taken from the baskets were:

Edison Company electric light bill from October 31 to December 3, 1930, for room 604 at 1547 Broadway, reading No. 6223, bill addressed to Herman Bernstein at 1547 Broadway.

Edison Company electric light bill from December 3, 1930, to January 5, 1931, for room 604 at 1547 Broadway, reading No. 6248, bill addressed to Herman Bernstein at 1547 Broadway.

Unsigned letter from Lefkowitz & Bernstein, 1547 Broadway, to L. Lieberman, 34 E. 12th Street, New York City, for merchandise delivered, $80.

Some 32-odd salesmen's order slips for intoxicating liquor with customers' names and addresses.

N. Y. Telephone Co. receipt No. 6225 dated January 8, 1931, acknowledging having received from Daniel Lefkowitz sum of $14.26 for telephone service, Chic. 4-8928.

A pencil memorandum containing names with amounts set after the respective names, some of these names being Myers, Gordon, French, and K.

A pencil memorandum containing names with amounts set after the names, one of them being Dan, $537, the total amount of the memorandum being $1,497.95.

hearing, all the papers and articles seized were produced and submitted to the court. The Government submitted, in opposition to respondents' motions, affidavits of its attorney, the deputy marshal and three of the four prohibition agents.

The district court denied respondents' motions. It construed the complaint to charge felony under § 37 of the Criminal Code defining conspiracy and § 21 of the National Prohibition Act defining nuisance, held that each of the papers seized was, within the meaning of §§ 21 and 22, kept and used to maintain a nuisance; said that "it is enough if the conspiracy was there or the petitioners or their associates had any of them gathered in the room to conduct the conspiracy or do any act to effect its object"; that "it might well follow that, in the sense of the word as used in the *Carroll* case, [267 U. S. 132] the seized papers were contraband" and that "it is not necessary, however, to determine that, for the reason that, at least within the *Marron* case [275 U. S. 192] all the papers were but usual and ordinary means of carrying on a business of the character presented here." 47 F. (2d) 921.

The Circuit Court of Appeals reversed. 52 F. (2d) 52. It found that the search of the person of Lefkowitz was lawful and that the things taken might be used as evidence against him, held that the things seized when the office and furniture were explored did not belong to the same class, referred to "the firmly rooted proposition that what are called general exploratory searches throughout premises and personal property are forbidden", and said that it did not matter "whether the articles of personal property opened and the contents examined are numerous or few, the right of personal security, liberty, and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. . . . Such a search and seizure as these officers indulged themselves in is not like that in *Marron* v. *United States* . . . where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made. The decision that does control is *Go-Bart Co.* v. *United States*, 282 U. S. 344. Indeed, this case differs in its essential facts from that one so slightly that what is said in that opinion in characterizing the search made will apply with

equal force to this one, which must accordingly be held unreasonable."

The Government maintains that the facts and circumstances set forth in the affidavits submitted by it constitute a sufficient showing not only that the arrests were lawfully made on a valid warrant for the offense charged in the complaint but also that, without regard to the warrant, the arrests were justified as having been made for a felony by officers believing upon probable cause that respondents committed it and that when arrested they were actually engaged in the commission of crime. And it argues that, since the arrests were lawful, the search of the place where they were made was lawful, and that, having the right to search the premises, the officers were bound to do it thoroughly.

It is clear that respondents were arrested in the proper execution of the warrant, and not by officers acting without a warrant merely upon probable cause to believe that respondents were guilty of a felonious conspiracy. The offense charged involved the use of the room only to solicit orders for liquor, to cause it to be delivered, to collect for it and divide proceeds. There is nothing in the record to support the claim that, at the time of the arrest, the offense for which the warrant issued or any other crime was being committed in the presence of the officers. It cannot be claimed that they saw conspiracy being committed or that any understanding, agreement or combination was being had, made or formed in their presence. *Go-Bart Co.* v. *United States, supra,* 357. The maintenance of a nuisance or conspiracy to maintain one is not involved. The complaint did not attempt or purport to charge either. It did not allege that the room was a place where liquor was or ever had been manufactured, sold, kept or bartered or that it contained fixtures or other things essential or intended to be used for the sale of liquor to be consumed on the premises or otherwise. The mere soliciting of orders from the room in connection with the other uses alleged in the complaint is not sufficient to constitute the maintenance of nuisance therein. See §§ 18, 21 and 22, National Prohibition Act, 27 U. S. C., §§ 30, 33 and 34. *Miller* v. *United States,* 300 Fed. 529, 535. *Schechter* v. *United States,* 7 F. (2d) 881. Cf. *Todd* v. *United States,* 48 F. (2d) 530, 532. The facts and circumstances stated in the affidavits of the prohibition agents do not support but are inconsistent with and negative

the assertions therein contained to the effect that respondents were arrested while committing the crime of conspiracy or nuisance.

The only question presented is whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of the arrests. And that must be decided on the basis of valid arrests under the warrant. Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken.

The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. *Byars* v. *United States*, 273 U. S. 28, 32. Its protection extends to offenders as well as to the law abiding. *Weeks* v. *United States*, 232 U. S. 383. *Agnello* v. *United States*, 269 U. S. 20, 32. The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. *United States* v. *Kirschenblatt*, 16 F. (2d) 202, 203. *Go-Bart Co.* v. *United States, supra*, 358.

Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or sus-

pected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled* v. *United States*, 255 U. S. 298, 310.

These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the *Marron* case. There, prohibition officers lawfully on the premises searching for liquor described in a search warrant, arrested the bartender for crime openly being committed in their presence. He was maintaining a nuisance in violation of the Act. The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises and other transactions including the keeping of accounts. The ledger and bills being in plain view were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense. The bills were deemed so closely related to the business that it was not unreasonable to consider them as employed to carry it on. While no use was being made of the book or papers at the moment of the arrest, they—like containers, chairs and tables for customers, the cash register, glasses and supplies—were kept to be utilized when needed. The facts disclosed in the opinion were held to justify the inference that when the arrest was made the ledger and bill were in use to carry on the criminal enterprise.

Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. *Boyd* v. *United States*, 116 U. S. 616, *et seq.* *Weeks* v. *United States*, 232 U. S. 383, 395. *Gouled* v. *United States, supra*, 306. *Carroll* v. *United States, supra.*

In *Entick* v. *Carrington*, 19 How. St. Tr. 1029, Lord Camden declared that one's papers are his dearest property, showed that the law of England did not authorize a search of private papers to help forward conviction even in cases of most atrocious crime and said (p. 1073): "Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty."

The teachings of that great case were cherished by our statesmen when the Constitution was adopted. In *Boyd* v. *United States*, *supra*, 630, this Court said: "The principles laid down in this opinion. [*Entick* v. *Carrington*] affect the very essence of constitutional liberty and security. . . . They apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life. . . . A forcible and compulsory extraction of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other". And this Court has always construed provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 406, 407, 421. *Boyd* v. *United States*, *supra*. *Byars* v. *United States*, *ubi supra*.

This case does not differ materially from the *Go-Bart* case and is ruled by it. An arrest may not be used as a pretext to search for evidence. The searches and seizures here challenged must be held violative of respondents' rights under the Fourth and Fifth Amendments.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.